89-1215

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1308

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs-Appellants,

and

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervening Plaintiff-Appellant,

v.

JOHNSON CONTROLS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 84-C-472—Robert W. Warren, *Judge.*

ARGUED SEPTEMBER 15, 1988—
REARGUED *En Banc* JUNE 15, 1989—
DECIDED SEPTEMBER 26, 1989

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges.*

COFFEY, *Circuit Judge*. Since 1982 Johnson Controls, Inc. hereinafter "Johnson Controls" or "Johnson") has maintained a fetal protection policy designed to prevent unborn children and their mothers from suffering the adverse effects of lead exposure. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereinafter "UAW"), several UAW local unions and a group of individual employees brought suit alleging that this policy violated Title VII, 42 U.S.C. § 2000e, *et seq.*[1] The district court granted summary judgment in favor of Johnson Controls and the plaintiffs appealed. This case was originally argued before a panel of this court and the panel's opinion was circulated among all the members of the court pursuant to Circuit Rule 40(f).[2] Prior to publication of the panel opinion, a majority of the members voted to hear the case before an *en banc* court and, following rehearing *en banc*, a majority of the court voted to affirm the decision of the district court.

I.

The Battery Division of Johnson Controls, Inc., was created upon Johnson Controls' 1978 purchase of Globe

[1] More than two years later, Local 322 of the Allied Industrial Workers of America attempted to intervene under Fed. R. Civ. P. 24(a)(2). The district court denied the motion, and Local 322 has appealed. We affirm the district court's decision on the basis of the motion's untimeliness. *See Schultz v. Connery*, 863 F.2d 551, 552-55 (7th Cir. 1988).

[2] Circuit Rule 40(f) reads in pertinent part:

> "*Rehearing Sua Sponte Before Decision.* A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued . . . ."

Union, Inc. (hereinafter "Globe" or "Globe Union").[3] Globe Union was formed through the consolidation of two battery companies and had been in the battery business for almost fifty years before Johnson's purchase. Globe Union and Johnson Controls have maintained ongoing efforts to improve industrial safety through measures designed to minimize the risk lead poses to those directly involved in the manufacturing of batteries.[4]

The steps that Globe Union and Johnson Controls have taken to regulate lead exposure have not been focused merely on complying with governmental safety regulations, but originate from their longstanding corporate concern for the danger lead poses to the health and welfare of their employees, their employees' families and the general public. During the period of the 1970's when OSHA's regulation of employee exposure to lead was virtually non-existent, Johnson Controls' predecessor, Globe Union, initiated a large number of innovative programs in an attempt to control and regulate industrial lead exposure. For example, in 1969, Dr. Charles Fishburn, M.D., who later became one of the primary proponents of Johnson Controls' fetal protection policy, instituted programs for monitoring employee blood lead levels.[5] In an attempt to manage lead exposure, other safety programs

[3] Following the purchase, Globe Union operated for some two years as a wholly-owned subsidiary of Johnson Controls, after which time it became a division of Johnson Controls, Inc.

[4] In fact, the Battery Division of Johnson Controls employs fourteen people in its department that implements its corporate health and safety program that includes the fetal protection policy at issue in this case.

[5] Dr. Fishburn is a board-certified specialist in occupational medicine, maintains a private practice and also has worked as Assistant Clinical Professor at the University of Wisconsin Medical School, Department of Preventive Medicine. Since 1963, Dr. Fishburn has evaluated between 25,000 and 50,000 employees for lead exposure.

were initiated at Globe and Johnson including a lead hygiene program, respirator program, biological monitoring program, medical surveillance program and a program regulating the type, use and disposal of employee work clothing and footwear to minimize lead exposure. Globe Union also transferred employees out of high lead environments whenever a physician's medical evaluation report established that the individual had a high blood lead level. In the case of such transfers, medical removal benefits were provided to the employee before OSHA required such compensation.[6] Globe Union and Johnson Controls have continued to address their serious concern for industrial safety through efforts to design and regulate lead manufacturing areas to reduce employee lead exposure. For example, laminar flow pumps constantly supply a down draft of low velocity clean air to improve the environment of workstations where employees deal with lead. Central vacuum systems and powered floor scrubbers and sweepers are used to keep the manufacturing area as clear of lead dust as possible. Since Johnson Controls' purchase of Globe Union in 1978, it has spent approximately $15 million on environmental engineering controls at its battery division plants.

Globe Union, Johnson Controls' predecessor, established its first policy regarding fetal protection from lead exposure in 1977 as part of its comprehensive efforts to protect its employees from exposure to lead. Globe Union's announcement of the policy in a memorandum to battery plant and personnel managers stated:

> "This change [the announced policy] has come about slowly as more and more medical opinion and evidence is persuasive of the risk to the unborn, developing child.

[6] These benefits provide compensation for transfer from a position for medical reasons.

> We have stopped short of excluding women capable of bearing children from lead exposure, but do feel strongly that those women who are working in lead exposure . . . and those women who wish to be considered for employment be advised that there is risk, that we recommend *not* working in lead if they are considering a family, and further that we ask them to sign a statement that they have been advised of this risk."

(Emphasis in original). In its 1977 "Statement of Risks," Globe also observed that at that time scientific and medical evidence had not as yet conclusively established the risk lead exposure posed to the unborn. However, after noting possible risks the 1977 policy statement read:

> "We would have to say that it is, medically speaking, just good sense not to run that risk [lead exposure] if you want children and do not wish to expose the unborn child to risk, however small, and so recommend that you counsel with your family doctor and advise us of your wishes to transfer."

Johnson adopted its current fetal protection program in 1982 following its determination, based upon scientific research, that it was medically necessary to bar women from working in high lead exposure positions in the battery manufacturing division. The fetal protection policy applies to work environments in which any current employee has recorded a blood lead level exceeding 30μg/dl during the preceding year or in which the work site has yielded an air sample during the past year containing a lead level in excess of 30μg per cubic meter.[7] The policy

[7] These lead levels coincided with the Centers for Disease Control's standard in effect at that time which concluded that blood lead levels in excess of 30 μg/dl were excessive for children. (As will be noted later in this opinion, the Centers for Disease Control have since revised downward the acceptable blood lead levels for children). We note that, because of Johnson's concern for the

recites that women with childbearing capacity will neither be hired for nor allowed to transfer into those jobs in which lead levels are defined as excessive.[8] A grandfather clause in Johnson's fetal protection policy permits fertile women who were assigned to high lead exposure positions at the time of the adoption of the policy to remain in those job assignments if they are able to maintain blood lead levels below 30 μg/dl.[9] Those employees who are removed from positions because of excessive lead levels are transferred to another job in Johnson's employ without suffering either a loss of pay or benefits.

The major reason Johnson adopted its current fetal protection policy was the inability of the previous voluntary policy to achieve the desired purpose: protecting pregnant women and their unborn children from dangerous blood lead levels. Between 1979 and 1983, at least six Johnson Controls employees in high lead exposure positions became pregnant while maintaining blood lead levels in excess of 20 micrograms. In addition, at

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mother and the unborn baby, the lead levels Johnson established in its fetal protection policy are below the 50 μg/m3 airborne lead levels and 50 μg/100g blood lead levels permitted under OSHA's lead exposure regulations for all employees. 29 C.F.R. § 1910.1025(c)(1) and (k)(1)(i)(D). While OSHA blood lead regulations utilized the measure of ug per 100 grams and Johnson Controls' standard uses the measure of ug per deciliter, the parties have treated these measures as equivalent and we shall also treat them in this manner.

[8] The fetal protection policy defines women of childbearing capacity as: "All women except those whose inability to bear children is medically documented."

[9] Under the fetal protection policy an incumbent female employee with a blood lead level reading above 30 μg/dl is permitted a period of time to reduce her blood lead level to 30 μg/dl. If the blood level of a fertile female employee is in excess of 40 μg/dl, she is transferred at the earliest possible date. The record does not disclose the number, if any, of female employees who remain in high lead exposure positions or who were transferred as a result of the fetal protection policy.

least one of the babies born to this group of employees later recorded an elevated blood lead level. Moreover, Johnson Controls' medical consultant, Dr. Fishburn, testified as follows concerning a specific lead-related incident:

"Q: Now, let's talk in terms of prior to 1983, at any of the other Globe plants, do you have any knowledge or do you have an opinion that in any instances the exposure of the mother—or the blood-lead level of the mother while she was pregnant had an effect on the fetus and, therefore, the child?

A: [Dr. Fishburn] Well, I'm not aware of any specific instances other than the one, which was in the early 80s, about 1981.

Q: And where was that?

A: Pardon?

Q: Where was that? What plant?

A: The Globe plant?

Q: Yes.

A: It was in Owosso.

Q: Where's the Owosso plant?

A: In Owosso, Michigan.

Q: In just simple terms, what was the nature of the problem?

A: The nature of the problem was hyperactivity and control of the child. And the child had elevated blood-leads and protoporphyrinia.

Q: In your medical judgment was the problem of the child affected in any way by the exposure of the mother during pregnancy?

A: In my opinion the history of the hyperactivity and the difficulty she was having with him could

very well and probably was due to the lead that he had." [10]

In announcing its new, more defined policy, Johnson Controls emphasized its continuing interest in the protection of employees and their families from occupational health hazards and was responding to the increased understanding of the risk of lead exposure that had de-developed in the five years since it established its former voluntary policy:

> "We have over the years developed policies to protect the health of our employees whenever the nature of their duties may expose them to a health hazard and to prevent members of their families from being exposed to a health hazard because of their employment with Globe Battery Division.
>
> Medical research has shown that a woman's exposure to lead can cause ill effects on the health of her unborn child because the lead absorbed in the mother's blood as the result of this exposure can cross the placenta and mix with the child's blood. This has been acknowledged by the Occupational Safety and Health Administration.
>
> Medical research also shows that a risk to the unborn child's health is present at a much lower blood-lead level than an adult. The ill effects of the unborn child can occur during the early stage of pregnancy, before the mother is aware that she is pregnant, and can continue throughout the pregnancy.

[10] In response to questioning concerning incidents of adverse effects upon fetuses or children resulting from maternal lead exposure, Dr. Fishburn also stated that among employees at Johnson Controls' Milwaukee, Wisconsin, battery plant (covered by a contract with the AIW): "Mothers who have had children . . . have gone to the City Health Department." However, obviously because of the confidentiality of such visits, Dr. Fishburn also stated that: "I don't have the data on all of the individuals that did that."

> Because of this, it is the Division's policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.
>
> This policy is intended to reduce or eliminate the possible unhealthy effects of lead on the unborn children of pregnant employees and applicants. It does not apply to those women who have medical confirmation that they cannot bear children. However, the policy is in no way intended to support or encourage women of childbearing capability to seek to change this status. Employees are strongly advised against any such action."

Prior to adopting its updated fetal protection policy, Johnson seriously considered alternatives to the exclusion of women with childbearing capacity from high lead exposure positions, but after research and consultation with medical and scientific experts found itself unable to structure and implement any alternatives which would adequately protect the unborn child from the risks associated with excessive lead exposure. Johnson's experience demonstrated that the voluntary exclusion program was ineffective. To date neither Johnson nor any other battery manufacturer has been able to produce a lead free battery, or to utilize engineering research and technology to implement a system or procedure capable of reducing the lead exposure of its employees to acceptable levels for fertile women. Limitation of the fetal protection policy to women actually pregnant was found ineffective because there is the very definite possibility that lead exposure will occur between conception and the time the woman discovers her pregnancy.[11] Such a limi-

[11] There will normally be some delay in diagnosis of pregnancy: "The first sign of pregnancy and the first reason most pregnant women see a physician is absence of an expected men-

tation is further inadequate because reduction of blood lead levels following removal from a lead exposure area requires a significant length of time that frequently extends well into the pregnancy term. Limitation of the policy to women planning pregnancy also was not found to be a suitable alternative because of one of the exigencies of life, the frequency of unplanned or undetected pregnancies. Permitting fertile female employees to attempt to maintain a blood lead level below 30 μg/dl or utilizing the mean or median blood lead levels of current workers as a measure of whether a woman should be permitted in a position would also not effectively protect the unborn child. The reason these actions would be inadequate is that an employee's risk of high lead levels is usually greatest immediately after commencement of work in a high lead environment.[12]

Dr. Fishburn, Johnson Controls' medical consultant, noted that Johnson and other corporations manufactur-

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strual period. If a patient's periods are usually regular, absence of menses for 1 wk or more is presumptive evidence of pregnancy. Pregnancies are usually dated in weeks, starting from the first day of the last menstrual period. Thus, if the patient's menses were regular and if ovulation did occur on day 14 of the cycle, obstetric dates are about 2 wk longer than embryologic dates. If the patient's periods are irregular, the difference will be greater or less than 2 wk. Usually, 2 wk after missing a period the patient is considered to be six wk pregnant and the uterus is correspondingly enlarged."

R. Berkow, *The Merck Manual of Diagnosis and Therapy*, 1744-45 (14th ed. 1987). Thus, even in ideal cases, there is normally some time lag between pregnancy's onset and diagnosis. In other cases, a mother's failure to perceive a pregnancy or a delay in receiving prompt medical care can result in a pregnancy diagnosis later in pregnancy. Under a policy requiring removal only on discovery of pregnancy, the unborn child would be subject to lead exposure throughout the period prior to diagnosis of pregnancy.

[12] This conclusion was based upon Johnson's experience recounted in the testimony of Jean Beaudoin, Manager of Health, Safety and Environmental Control for the Battery Division.

ing batteries accept and routinely follow these medical policies:

"Q: Now, you testified as to what other industries had done in the past with respect to women working—women capable of bearing children working in high lead areas. Are you familiar with other companies as to their practices?

A: [Dr. Fishburn] Yes.

Q: And which companies?

A: Well, I'm familiar with a good many companies that I've worked with here in the area in foundry industry. I'm familiar with General Motors, Dow Chemical, Ford Motor Company, Owens-Corning. There's a large number of large and small companies that I'm familiar with, and where there are occupational standard programs within those companies I've exchanged the information with them.

Q: And what problems do they have in regard to this problem?

A: In regard to lead even the doctors—as I said Dr. Kehoe or Dr. Bellmap here—any doctor that has worked with lead, either in the mines as I did with Bellmap, or smelters, primary smelter we did not, and—and I was never taught to place a reproductive female in the average work exposure of lead. And furthermore, before the 60s, to my knowledge, no women were working in lead exposures. It was Kehoe's opinion at the time that any doctor that would allow this to happen was committing malpractice.

Q: Now this was—now my question was: Are you familiar with what other companies are doing now?

A: Yes.

Q: What are they doing?

A: They are restricting women from lead exposure who can have children."

In altering its fetal protection policy to more effectively protect the unborn child and its mother, Johnson responded to the most recent medical evidence which established that lead exposure *in utero* presents a substantial health risk to the unborn child, as well as its female employees, and believed that Title VII would allow it to address this risk.

II.

Proper analysis of the Title VII issues this case presents requires a thorough understanding of the following fundamental question: Does lead pose a health risk to the offspring of Johnson's female employees? In considering the evidence in the record on this subject it is important to note that *both* the UAW and Johnson Controls agree on appeal that a *substantial* health hazard to the unborn child in the womb has been established. The UAW admits in its brief that "it is clear that . . . substantial risk of harm to the fetus . . . has been established." UAW Brief at 33. Similarly, Johnson Controls states that "[t]he evidence in the record on [substantial risk of harm to the fetus] is overwhelming." Johnson Controls Brief at 22.

The record very clearly establishes that once lead is deposited in a mother's blood, it crosses the placenta and affects her unborn child. Because the fetus' blood system is nourished by the mother, the unborn child possesses approximately the same blood lead level as the mother.[13]

[13] *See* Affidavit of J. Julian Chisholm, M.D., Director, Lead Program, J. F. Kennedy Institute and Associate Professor of Pediatrics, Johns Hopkins School of Medicine (hereinafter Dr. Chisholm Aff.) at ¶ 6 ("During pregnancy the lead in the mother's blood transfers across the placenta to the fetal circulation"); Affidavit of Dr. Anthony R. Scialli, M.D., Director, Reproductive Toxicology Center (hereinafter Dr. Scialli Aff.) at ¶ 6 ("During pregnancy the mother's blood lead passes through the placenta to the fetus. Therefore, the fetus' blood lead level is approximately the same as that of the mother"). *See also* Occupational Safety and Health Administration, U.S. Department of Labor, Final Standard for Occupational Exposure to Lead: Attachments to the Preamble, 43 Fed. Reg. 54,395 (1978) ("There is conclusive evidence that lead crosses the placenta of pregnant women and enters the fetal tissues; lead levels in the mother's blood are comparable to concentrations of lead in the umbilical cord at birth").

It is similarly undisputed that the unborn child "is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child." Affidavit of J. Julian Chisholm, M.D. (hereinafter Dr. Chisholm Aff.) at ¶ 6.[14] *See* Affidavit of Dr. Anthony R. Scialli, M.D. (hereinafter Dr. Scialli Aff.) at ¶ 5 ("[B]ecause of the extremely rapid development of the central nervous system during gestation, the fetus may be even more sensitive to toxic effects of lead than the young child");[15] Affidavit of M. Donald Whorton, M.D. (hereinafter Dr. Whorton Aff.), at ¶ 8 ("[Recent medical studies] suggest that even relatively low levels of lead exposure to the fetus can cause damage to the higher brain function resulting in decreased neurobehavioral development in the child");[16] Deposition of Marvin S. Legator, Ph.D. (hereinafter Dr. Legator Dep.) at 49 (UAW witness) ("There is no question about the sensitivity of the fetus. . . . I don't think one could argue about the fact that lead affects the fetus");[17] Deposition of Ellen Silbergeld, Ph.D. (hereinafter Dr. Silbergeld Dep.) at 21-23 (UAW witness) (Noting that in the area

[14] Director, Lead Program, John F. Kennedy Institute and Associate Professor of Pediatrics, Johns Hopkins School of Medicine.

[15] Director, Reproductive Toxicology Center.

[16] Senior Occupational Physician Epidemiologist, Environmental Health Associates, Inc., Oakland, California.

[17] Professor and Director of the Division of Environmental Toxicology, University of Texas Medical Branch.

of central nervous system impairment a young child is probably more sensitive than an adult and that the consequences for the young child and the fetus are similar).[18] The Centers for Disease Control summarized these basic facts in a document questioning the efficacy of current OSHA standards in protecting the unborn child and implying that an unborn child is adversely affected by lead levels lower than 30 μg/dl reflected in Johnson Control's fetal protection policy:

> "In a pregnant woman, lead crosses the placenta and lead concentrations in umbilical cord blood are nearly equal to those in maternal blood. *Since the growing brain of the fetus is likely to be at least as sensitive to the neurologic balance of lead as the brain of a young child, umbilical cord blood levels should be at least below 25 μg/dl.* Therefore, the OSHA standard is probably not sufficiently strict to protect the fetus. Further study is needed to define acceptable lead levels among women of childbearing age.
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> • • • •
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> "Ideally, engineering features should prevent workers from being exposed to lead dust and vapors. When workers are exposed, compliance with Occupational Safety and Health Administration (OSHA) regulations appears to be effective in preventing them from transporting lead home to children. . . . *The prevention of lead exposure to the fetus needs special emphasis. Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs.*" [19]

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[18] Senior Scientist, Toxic Program, Environmental Defense Fund.

[19] Centers for Disease Control, U.S. Department of Health and Human Services, *Preventing Lead Poisoning in Young Children* 7, 20, 21 (1985) (emphasis added). In this same document the Centers for Disease Control announced that based upon "current knowledge concerning screening, diagnosis, treatment, followup, and environmental intervention for children with elevated blood lead

The chief reason why an unborn child's lead exposure is of such great concern is that it has been medically established that lead attacks the fetus' central nervous system and retards cognitive development. *See* Dr. Chisholm Aff. at ¶ 6 ("[H]arm [to the fetus] includes . . . retarded cognitive development which may result in learning deficiencies and behavioral disorders"); Dr. Scialli Aff. at ¶ 7 ("The potential damage to the central nervous system of the fetus from lead exposure includes intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities. It is my medical opinion that such damage may be permanent"); Dr. Whorton Aff. at ¶ 8 ("[Recent medical studies] suggest that even relatively low levels of lead exposure to the fetus can cause damage to the higher brain function resulting in decreased neuro-behavioral development in the child"); Affidavit of Dr. Paul B. Hamon, Ph.D., Professor, Environmental Health, University of Cincinnati (hereinafter Dr. Hammond Aff.) at ¶ 3 ("[As] the director of a study that is currently being conducted in Cincinnati on the health effects of lead exposure on children . . . [we] analyze[] the subsequent mental development of children who have been exposed to lead both in utero and postnatally. The initial results of this ongoing study . . . establish that exposure of the fetus to maternal blood levels in excess of 12 micrograms per deciliter of whole blood creates a significant risk of low birth weight and a clear decrement in the subsequent mental development of the infant"); Dr. Silbergeld Dep. at 64 (Describing studies of child exposure to lead, in which she participated, which are "highly consistent with reports of hyperactivity, decreased attention span, learning problems which have been described in [lead exposed] children"), and at 49-50 (Reporting that studies of prenatal lead

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levels," it was lowering its definition of an elevated blood lead level from 30 to 25 μg/dl. *Id.* at 1. Elevated blood level, according to the CDC, "reflects excessive absorption of lead." *Id.*

exposure in which she participated found similar effects to post-natal lead exposure. These effects are "substantial irreversible cellular and functional damage to the brain").[20]

Unlike physical birth defects, such as those associated with thalidomide,[21] lead's sometimes subtle damaging effects may not fully manifest themselves until the child is diagnosed as having learning problems in a school setting some five to six years after birth:

> "What we are worried about are very subtle things, the ability to really affect learning ability. And so far as impairing the child's progress, they really aren't evident until he gets into school. He discovers that he can't remember, that his brain cannot pay attention, what our psychologists here called deficits in auditory processing, which is a fancy way of saying they can't understand what they hear, can't process it, and use it effectively. And those things will impair a child perhaps toward the end of the first grade, particularly in the second grade."

Deposition of Dr. J. Julian Chisholm, Jr., M.D., Director, Lead Program, John F. Kennedy Institute and Associate Professor of Pediatrics, Johns Hopkins School of Medicine (hereinafter Chisholm Dep.), at 27.

Probably the worst aspect of lead's influence upon an unborn child's future intellectual development is that its

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[20] Indeed, as noted in section I, *supra*, Johnson Controls experienced an incident of hyperactivity in a child of a woman in the work force of its Owosso, Michigan, battery plant.

[21] Thalidomide is "[a] sedative and hypnotic [drug] commonly used in Europe in the late 1950's and early 1960's. Its use was discontinued because it was discovered to cause serious congenital anomalies in the fetus, notably amelia [absence of limbs] and phocomelia [absence of the proximal portion of a limb], when taken by a woman during early pregnancy." *Dorland's Illustrated Medical Dictionary* 1353 (26th ed. 1981).

effects have frequently been found to be irreversible.[22] Further, the most recent research suggests that the unborn child may be affected at lead levels previously believed safe. *See* J.M. Davis & D. Svendsgaard, *Lead and Child Development*, 329 Nature 297 (1987) (Collecting results of recent studies in this area).

Lead exposure can also pose other physical threats to the unborn child such as reduction of the infant's birth weight, premature delivery, and stillbirth. *See* Dr. Chisholm Aff. ¶ 6. Lead may also affect the other vital fetal organs including, but not limited to, the liver and kidneys.[23]

The danger resulting from lead exposure cannot simply be avoided through removing a pregnant woman from lead exposure promptly after the discovery of pregnancy. Dr. Chisholm, a recognized expert in the research field of treatment and prevention of lead poisoning in young children, observed that "excluding only women who are actually pregnant from work areas where there are elevated blood lead levels would not sufficiently protect the health and safety of the unborn child." Dr. Chisholm Aff. at ¶ 10. This is true because *lead continues to exert an effect upon the mother and her unborn child for a sig-*

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[22] *See* Dr. Chisholm Aff. at ¶ 6 ("Medical studies released in the last year or two . . . suggest that exposure to the fetus of blood lead levels as low as 10 micrograms presents grave risk of permanent harm to the central nervous system of the fetus"); Dr. Scialli Aff. at ¶ 7 ("It is my medical opinion that [the damage lead causes to the fetus' central nervous system] may be permanent"); Dr. Silbergeld Dep. at 49-50 (Reporting that studies of prenatal lead exposure in which she participated found similar effects to post-natal lead exposure. These effects are "substantial irreversible cellular and functional damage to the brain").

[23] *See* Dr. Silbergeld Dep. at 50-52. Early in pregnancy, lead's effect upon the mother's secretion of the hormone progesterone can prevent implantation of the fertilized ovum, resulting in the loss of pregnancy. *See* Dr. Chisholm Dep. at 33.

nificant period of time after she has been removed from lead exposure. Dr. Chisholm's uncontroverted affidavit explained:

> "[S]ubstantial medical evidence . . . establishes that lead remains in the body for a significant period of time after removal from a high lead environment. Lead builds up not only in the blood and soft tissues, but is also stored in the bones. Following removal from the high lead environment, as the lead built up in the blood and soft tissues leaves the body, the lead in the bone begins to turnover, thus maintaining high blood lead levels even long after removal. As a general rule of thumb, it takes approximately two or three times as long for the blood leads to decrease as it did for such blood levels to increase. Therefore, if a woman is exposed to blood lead levels in excess of 25 or 30 micrograms for any length of time, such levels will not decrease sufficiently to avoid damage to the fetus, even if she is removed when the pregnancy is discovered."

Dr. Chisholm Aff. at ¶ 10. *See also* Whorton, *supra* note 16, at 8 ("Since lead is an accumulative toxicant which is stored in the bone, with a half-life in the body of 5 to 7 years, a woman with a significant blood lead burden would pose a potential hazard to any conceptus *for many years after exposure*"); Dr. Silbergeld Dep. at 27-28 ("For all purposes there is continuing exposure to lead even after removal from sources of lead . . . . If it were possible to take a person into a lead-free environment after an episode of exposure, the turnover of lead is probably on the order of 100 days. So *within a year or so* there would be a reduction in lead. There is also, of course, a rapid removal of lead from the blood into the bones [and] soft tissue that is no longer available for circulation. But considering that most people are not removed to lead-free environments, even if they go from areas of relatively high exposure to lower exposures,

there is continuing cyclic . . . exposure to lead" (emphasis added). Furthermore, because lead is stored in the mother's bones, and "because the bones may decalcify during pregnancy in order to provide the fetus with calcium, there may be an additional danger of transfer of stored lead to the fetus." Dr. Chisholm Aff. at ¶ 10. *See also* Whorton, *supra* note 16, at 7-8 ("[Dr. W.] Manton [in a 1985 edition of the British Journal of Industrial Medicine] reported on a longitudinal study of blood lead levels in a woman before, during and after pregnancy. He reported a doubling of pre-pregnancy blood levels during pregnancy and suggest[ed] mobilization of lead from bone during pregnancy as the mechanism") (footnote omitted). These conclusions are consistent with research that OSHA relied upon and quoted in establishing its 1978 lead standard:

> "The placenta also has considerable storage capacity, and during the first few months of pregnancy, it grows tremendously in size while the fetus remains relatively small. Calcium along with other substances is stored in the placenta to be used in the later months of pregnancy for growth by the fetus. It could be expected that lead would be similarly stored."

Occupational Health and Safety Administration, U.S. Department of Labor, Final Standard for Occupational Exposure to Lead: Attachments to Preamble, 43 Fed. Reg. 54,395 (1978) (quoting study of Dr. Vilma Hunt, Associate Professor of Environmental Health, Pennsylvania University, contained in OSHA's record).[24]

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[24] OSHA went on to observe that

> "Dr. Hunt would not exclude the potential for lead-induced effects on the initial trimester of pregnancy. She maintains that the presence of lead in fetal tissue does not necessarily indicate that the observed effects occurred during the second and third trimester; they may, in fact, be the result of earlier accumulations of lead in the first trimester of pregnancy. . . . [T]he

The overwhelming evidence in this record establishes that an unborn child's exposure to lead creates a substantial health risk involving a danger of permanent harm. This evidence clearly approaches a "general consensus within the scientific community," and certainly "suffices to show that within that community there is [a] considerable body of opinion that significant risk exists to the unborn child from exposure to lead." *Wright v. Olin Corp.*, 697 F.2d 1172, 1191 (4th Cir. 1982). Next we consider the proper legal standards to be applied when employees bring a Title VII sex discrimination action challenging an employer's response to this serious health risk.

III.

Having considered both the nature of the risk of harm that lead exposure presents to the unborn child and the mother and the policies Johnson implemented in response to this problem, we now turn to the question of the proper legal analysis to be applied to Johnson's fetal protection program under Title VII. The question presented is should we follow the lead of the Fourth Circuit, the Eleventh Circuit and the EEOC in determining that these policies can be justified with a "business necessity" defense or must we conclude that these policies may only be justified with a bona fide occupational qualification defense.

In approaching this issue we are cognizant of the mandates the United States Supreme Court has recited on two occasions concerning the necessity of avoiding rigid

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> fetus [can be] directly affected by lead which is absorbed during the first trimester of pregnancy. As the placenta is maturing, and the placental barrier is thinning, it is storing calcium necessary for later fetal skeletal production. Concomitant with the first evidence of fetal skeletal calcification, lead is observed present in the fetus. Like calcium, lead may be stored in the placenta during the early stages of pregnancy to be released when the placenta becomes functional."

Id. (citations omitted).

application of proof patterns to particular factual situations. The Court's concern was first set forth in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978), where the Court noted that the formula it had devised for demonstrating a prima facie case of disparate treatment in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) "was not intended to be an inflexible rule." The Court expanded on this same subject in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977), when it observed:

> "Our decision in [*McDonnell Douglas*] did not purport to create an inflexible formulation. We expressly noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." [*McDonnell Douglas*, 411 U.S. at 802 n.13]."

(Footnote omitted). The thrust of these repeated Supreme Court pronouncements is that courts are required to avoid inflexible application of judicially devised proof patterns in cases that present factual circumstances different from those encountered previously. *See also Wright v. Olin Corp.*, 697 F.2d 1172, 1184 (4th Cir. 1982). Any proof scheme a federal court applies is useful only if it assists the court in properly identifying the employment practices Congress intended to prohibit under Title VII. These concerns are particularly important in a case of this nature where the interest in financial reward is balanced against a medically established risk of the birth of a medically or physically deprived baby and where the challenged distinction is based upon the reality that only the female of the human species is capable of childbearing.

Two other federal courts of appeals and the Equal Employment Opportunity Commission have addressed the

question of the defenses available to an employer under Title VII in a case challenging a fetal protection program. The first court of appeals to address this question was the Fourth Circuit in *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). That case involved a fetal protection program very similar to the one Johnson instituted, in that it forbade any fertile woman from working in a job which "'may require contact with and exposure to known or suspected abortifacient or teratogenic agents.'" *Olin*, 697 F.2d at 1182. In considering which of several possible theories of claim and defense should apply in a Title VII analysis of a fetal protection policy, the Fourth Circuit observed:

> "We must start by conceding that the fact situation [the fetal protection policy] presents does not fit with absolute precision into any of the developed theories. It differs in some respects—either in its claim or defense elements—from each of the paradigmatic fact situations with which the different theories have been centrally concerned. This of course accounts for the conflict on the point between the parties.
>
> "That there would be such fact situations in Title VII litigation has always been recognized by the Supreme Court as it has developed and applied the different theories. *The Court has continually admonished, and indeed demonstrated in its own decisions, that these theories were not expected nor intended to operate with rigid precision with respect to the infinite variety of factual patterns that would emerge in Title VII litigation.* So has this court."

697 F.2d at 1184 (emphasis added, footnotes omitted).

The court applied the disparate impact business necessity theory of claim and defense that normally is applied only in cases in which an employer's policy is "facially neutral." Even though the court recognized that the facial neutrality of a fetal protection policy "might be subject

to logical dispute, the dispute would involve mere semantic quibbling having no relevance to the underlying principle that gave rise to this theory." 697 F.2d at 1186. Because a fetal protection policy involves motivations and consequences most closely resembling a disparate impact case, the Fourth Circuit felt it should be analyzed under the disparate impact business necessity theory. *See id.* The Fourth Circuit defined the business necessity defense in the context of a fetal protection policy as requiring a demonstration that "significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary, for the safety of the unborn children, that fertile women workers though not men workers, be appropriately restricted from exposure to those hazards . . . ." 697 F.2d at 1190 (footnote omitted). However, the Fourth Circuit permitted this evidentiary demonstration to be rebutted with proof that "there are 'acceptable alternative policies or practices which would better accomplish the business purpose . . . [or protect against the risk of harm], or accomplish it equally well with a lesser differential . . . impact [between women and men workers].'" [25]

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[25] *Id.* at 1191 (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)). Johnson Controls' primary interest in this case is protecting the development and health of female employees and their unborn children. In construing the business necessity defense the Fourth Circuit in *Olin* cogently observed:

> "We do not think that a general basis for the 'business necessity' asserted here need be sought in other considerations than the general societal interest—reflected in many national laws imposing legal obligations upon business enterprises—and having those enterprises operate in ways protective of the health of workers and their families, consumers, and environmental neighbors.
>
> For this reason it is irrelevant that, as claimants point out, the mere purpose to avoid potential liability and consequent economic loss may not suffice, standing alone, to establish a

The Eleventh Circuit utilized a similar analysis in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984) (Tuttle, J.). In *Hayes* a hospital terminated a pregnant woman's employment upon discovering her pregnancy. In *Hayes* the Court utilized the elements of the business necessity defense found in *Olin* to establish that the involved policy was not "facially discriminatory." The Eleventh Circuit stated: "In other words, the employer must show (1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace and (2) that the hazard applies to fertile or pregnant women, but not to men." 726 F.2d at 1548 (footnote omitted). The theory underlying the facial neutrality analysis utilized in *Hayes* is that a policy meeting the above criteria "is neutral in the sense that it effectively and equally protects the offspring of all employees." 726 F.2d at 1548. If facial neutrality is established, the court proceeds to a disparate impact business necessity analysis. 726 F.2d at 1552. Under the Eleventh Circuit's analysis, if facial neutrality is not established, the employer must present a bona fide occupational qualification defense to justify its fetal protection policy.

The Eleventh Circuit went on to set out the disparate impast business necessity analysis it would apply in cases where facial neutrality was established. The court recognized that a fetal protection policy, even if "facially neutral," "clearly has a disproportionate impact on women

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business necessity defense. *See Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978)."

697 F.2d at 1190 n.26.

Although costs from tort judgments are merely a secondary consideration, they are still an important and legitimate additional consideration for an employer when lead safety policies may very well affect the development of the child in its most critical stage in the mother's womb.

since only they are affected by it." *Id.* However, "the employer's business necessity defense applies automatically, just as the employee's prima facie case of disparate impact applies automatically. That is because to reach the disparate impact stage of analysis in a fetal protection case, the employer has *already proved*—to overcome the presumption of facial discrimination—that its policy is justified on a scientific basis and addresses a harm that does not affect men." *Id.* at 1553. As in *Olin*, "the employer's business necessity defense may be rebuttted by proof that there are acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would accomplish the purpose with less adverse impact on one sex." *Id.*

Although *Olin* and *Hayes* present somewhat different analyses, both cases, in essence, determine that a business necessity defense in a fetal protection policy case requires (1) a demonstration of the existence of a substantial health risk to the unborn child, and (2) establishment that transmission of the hazard to the unborn child occurs only through women. Both cases also allow the employee to present evidence of less discriminatory alternatives equally capable of preventing the health hazard to the unborn.

On October 3, 1988, the Equal Employment Opportunity Commission, the agency responsible for the administration of Title VII, issued a *Policy Statement on Reproductive and Fetal Hazards Under Title VII* that, in substance, endorsed the approaches that the Fourth and Eleventh Circuits have taken to fetal protection cases. Equal Employment Opportunity Commission, *Policy Statement on Reproductive and Fetal Hazards Under Title VII* (October 3, 1988) (found in Fair Empl. Prac. Manual (BNA) 401.6013). As the Supreme Court has recognized, while such EEOC pronouncements "do not have the force of law, . . . still they ' "constitute a body of experienced and informed judgment to which courts and litigants may

resort for guidance." '" *Local No. 93, International Association of Fire Fighters v. City of Cleveland*, 478 U.S. 501, 518 (1988) (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) which quoted, in turn, *Skidmore v. Swift & Co.*, 223 U.S. 134, 140 (1944)). A fair reading of the EEOC's Policy Statement reflects that the EEOC thoroughly considered the various interests under Title VII and followed earlier judicial decisions only after concluding that these decisions properly implemented Title VII policies. The EEOC noted that fetal protection "*cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves.*" *Policy Statement* (found in Fair Empl. Prac. Manual (BNA) 401:6013, 6015 n.11) emphasis added). The EEOC then candidly recognized that fetal protection policies that "exclude only women constitute *per se* violations of the Act." *Id.* at 401:6014 (footnote omitted). However, the EEOC went on to observe that

> "[a]lthough the BFOQ defense is normally the only one available in cases of overt discrimination, *the Commission follows the lead of every court of appeals to have addressed the question [in determining] that the business necessity defense applies to these cases. While business necessity has traditionally been limited to disparate impact casts, there is an argument that in this narrow class of cases the defense should be flexibly applied.*"

Id. at 401:6014-15 (emphasis added, footnote omitted). The EEOC concluded that:

> "The issues [in a fetal protection policy case to which the business necessity defense is applicable] are (1) whether there exists a substantial risk of harm to employees' offspring through the exposure of employees to a reproductive hazard in the workplace; (2) whether the harm to employees' offspring takes place through the exposure of employees of one sex but not employees of the opposite sex; and (3) whether the employer's policy effectively eliminates the risk of fetal or reproductive harm. Even if these elements are proved, the policy will not withstand scrutiny [if] it is shown that there exists a reasonable alternative policy that will protect employees' offspring from fetal or reproductive harm and that has a less discriminatory impact on employees of the restricted sex. Thus, an employer's reproductive or fetal protection policy must be neutrally designed to protect all employees' offspring from hazards existing in the workplace. Where substantial evidence exists that the risk of harm to employees' offspring takes place only in the workplace, an employer may exclude from the workplace employees of that sex, but only to the extent necessary to protect employees' offspring from reproductive or fetal hazards."

Id. at 401:6015-16 (footnotes omitted).

We agree with the Fourth Circuit, the Eleventh Circuit and the EEOC in their conclusion that a business necessity defense may be utilized in a fetal protection policy case. It is interesting to note that neither the text of Title VII nor Supreme Court pronouncements mandate a holding that all forms of facial discrimination are justifiable only with a bona fide occupational qualification defense. *See Olin*, 697 F.2d at 1186 n.21 ("While the loose equation—overt discrimination only B.F.O.Q. defense —is . . . properly descriptive of a paradigmatic litigation pattern, it is not an accurate statement of any inherent constraints in Title VII doctrine"). *See also Scherr v. Woodland School Community Consolidated District, No. 50*, 867 F.2d 974, 977-81 (7th Cir. 1988) (Permitting business necessity defense to be utilized under Pregnancy Discrimination Act).

We are convinced that the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests

of the employer, the employee and the unborn child in a manner consistent with Title VII. The requirement of a substantial health risk to the unborn child effectively distinguishes between the legitimate risk of harm to health and safety which Title VII permits employers to consider and the "[m]yths of purely habitual assumptions" [26] that employers sometimes attempt to impermissibly utilize to support the exclusion of women from employment opportunities. Likewise, the requirement that the risk of harm to offspring be substantially confined to female employees means that a fetal protection policy applying only to women recognizes the basic physical fact of human reproduction, that only women are capable of bearing children. Finally, the employee's option of presenting less discriminatory alternatives to a fetal protection policy assures that these policies are only as restrictive as necessary to prevent the serious risk of harm to the unborn child. Accordingly, we agree with the Fourth Circuit, Eleventh Circuit and EEOC that the business necessity defense can be appropriately applied to fetal protection policy cases under Title VII. We now proceed to determine whether this defense can be utilized to sustain Johnson Controls' fetal protection policy.

IV.

In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2125-26 (1989), the Supreme Court recently described the general policies underlying the business necessity defense that we utilize in considering Johnson Control's fetal protection policy:

> "Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of . . . a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate

[26] *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978).

> employment goals of the employer. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils. . . ."

(Citations omitted).

In *Wards Cove* the Court also clarified the proof burdens to be applied in addressing an employer's business necessity defense:

> "[T]he employer carries the burden of producing evidence of a business justification for his employment practice. *The burden of persuasion, however, remains with the disparate-impact plaintiff.* To the extent that the Ninth Circuit held otherwise in its en banc decision in this case, or in the panel's decision on remand—suggesting that the persuasion burden should shift to the [defendants] once the [plaintiffs] establish a prima facie case of disparate impact—its decisions were erroneous. '[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times.*' *Watson [v. Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777, 2790 (1988)] (O'Connor, J.) (emphasis added). This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, and more specifically, it conforms to the rule in disparate treatment cases that the

> plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. We acknowledge that some of our earlier decisions can be read as suggesting otherwise. But to the extent that those cases speak of an employers' (sic) 'burden of proof' with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden. The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity. See 42 U.S.C. § 2000e-2(a)."

Wards Cove, 109 S. Ct. at 2126 (citations omitted, emphasis added).

The allocation of the burden of proof under substantive Title VII law outlined in *Wards Cove* plays a significant role in summary judgment proceedings of this nature. We have previously recognized that: "Summary judgment is properly entered in favor of a party when the opposing party is unable to make a showing sufficient to prove an essential element of a case on which the opposing party bears the burden of proof." *Common v. Williams*, 859 F.2d 467, 469 (7th Cir. 1988). The Supreme Court explained the reasons for this rule in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986):

> "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden the proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,'

> since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."

"Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is not 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). Thus, the question we must address is whether the UAW, which bears the burden of persuasion, has presented evidence sufficient to permit the district court to conclude that Johnson Controls' business necessity defense cannot be factually supported.

Our inquiry must be based on the underlying premise that the creation of a record adequate to meet legal challenges is the responsibility of the parties litigating the case. We may neither add nor subtract from the record; we must accept it as it is. Thus, "[w]hen confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue, may not rest on its pleadings, but must affirmatively demonstrate by specific factual allegations, that there is a *genuine* issue of material fact which requires trial." *Beard v. Whitley County, REMC*, 840 F.2d 405, 410 (7th Cir. 1988) (emphasis in original). As we have also noted: "A district court need not scour the record to make the case of a party who does nothing. . . . [C]ourts will not discover that the movants slighted contrary information if opposing lawyers sit on their haunches; judges may let the adversary system take its course." *Herman v. City of Chicago*, 870 F.2d 400, 404 (7th Cir. 1989). We now

turn to whether the UAW has established a genuine issue of material fact concerning any of the elements of the business necessity defense upon which it bears the burden of persuasion.

A. *Substantial Risk of Harm to the Unborn Child*

Both the UAW and Johnson Controls agree on appeal that the significant evidence of risks to the health of the fetus contained in the record establishes a *substantial* health risk to the unborn child. The UAW in its brief admits that "it is clear that . . . substantial risk of harm to the fetus . . . has been established." UAW Brief at 33. Similarly, Johnson states that "[t]he evidence in the record on [substantial risk of harm to the fetus] is overwhelming." Johnson Controls Brief at 22. In light of the parties' agreement on the question of substantial risk of harm to the unborn child, this issue is not before this court on appeal.

Although the parties do not contest this question on appeal, the evidence in the record that we recounted in Section II, *supra*, conclusively supports the accepted medical and scientific finding that lead creates a substantial risk of harm to unborn children. In order to present the risk of harm necessary to sustain a fetal protection policy "it is not necessary to prove the existence of a general consensus on the [question of risk of harm to the unborn child] within the qualified scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one." *Olin*, 697 F.2d at 1191. The overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child from lead exposure, found in the record and set forth in Section II, *supra*, approaches a "general consensus within the qualified scientific community," and certainly "suffices to show that

within that community there is [a] considerable body of opinion that significant risk exists." [27] Accordingly, we are convinced that there is no genuine issue of material fact with respect to this component of Johnson Controls' business necessity defense.[28]

B. *Exposure Through a Single Sex*

The UAW's efforts in this case have primarily been devoted toward negating the second element of Johnson's business necessity defense, that the risk of transmission of potentially harmful lead exposure to unborn children is substantially confined to fertile female employees. On this issue, as with the question of substantial risk of harm to the unborn child, "it is not necessary to prove the existence of a general consensus on the [issue] within the qualified scientific community." *Olin*, 697 F.2d at 1191.

In this case Johnson Controls' experts, without exception, testified that a male worker's exposure to lead at levels within the 50 μg dl maximum set forth in OSHA's current (1978) lead exposure guidelines did not pose a substantial risk of genetically transmitted harm from the male to the unborn child. Moreover, Johnson's experts took the position that because this data dealt exclusively with animals, the results of these studies were not scientifically established as being applicable to humans. In contrast, the UAW witnesses posited that animal studies had

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[27] *Olin*, 697 F.2d at 1191.

[28] There might be a suggestion that the unborn child would be harmed if his or her mother were deprived of insurance benefits or wages that could be utilized for prenatal care as a result of the application of Johnson Controls' fetal protection policy. This issue bears no relevance to Johnson Controls' employment practices for any female employees deprived of jobs in high lead environments under Johnson's fetal protection policy, instituted in 1982, are transferred to other positions in Johnson Controls' employ without *any* loss of either wages benefits.

demonstrated that there was a possible risk of genetic damage to human offspring as a result of male lead exposure. The UAW witnesses attempt to bridge the wide chasm between the results of animal studies and a conclusion of genetic harm allegedly transmitted through the male human being with human studies merely establishing a correlation between male lead exposure and changes in sperm shape. It is interesting to note that the UAW has not presented any medical evidence in the record of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure. It is this lack of convincing scientific data that the plaintiffs attempt to gloss over and cast aside in ignoring the differences between the effect of lead on the human and animal reproductive systems.[29]

As noted previously, when the Title VII disparate impact business necessity proof scheme is applied at the summary judgment phase of litigation, the UAW is required to present facts sufficient for the trier of fact to conclude that transmission of the significant risk of harm lead presents to the unborn child is not substantially confined to female employees. Unlike the recorded evidence of a substantial risk of harm resulting to an unborn child from exposure to lead through the mother's blood stream and placenta, the evidence of risk to the unborn child resulting from exposure of the father to the lead levels currently present in Johnson Controls' battery manufacturing factories is, at best, speculative and unconvincing. The UAW's animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead. The facts the UAW posits do not negate the conclusion that the harm lead

[29] See Dr. Scialli Aff. at ¶ 9, Dr. Hammond Aff. at ¶ 7, Dr. Chisholm Dep. at 30-32.

exposure causes to the unborn child is "substantially confined to female employees."[30] Accordingly, we are convinced that the UAW has failed to present facts sufficient to carry its burden of demonstrating the absence of the second element of Johnson Controls' business necessity defense, application of the risk of transmitting lead exposure to unborn children only through females.

This recognition of the physical differences between the human sexes creates a distinction between men and women that accords with our previous recognition that Title VII permits distinctions based upon the real sex-based differences between men and women, especially those related to child birth. As we observed in *Torres v. Wisconsin Dept. of Health and Human Social Services*, 859 F.2d 1523, 1527-28 (7th Cir. 1988) (en banc):

> "Myths and purely habitual assumptions about a woman's (or a man's) inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978). On the other hand, there are real as well as fictional differences between men and women. *Id.* For instance, the Supreme Court has never hesitated to recognize sex-based differences, particularly in cases involving physiology, marriage, childbirth, or sexuality. *See Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) ("[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."); *id.* at 481 (Blackmun, J., concurring): "The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really

[30] *Id.*, 631 F.2d at 1181.

exist.') *See generally Parham v. Hughes*, 441 U.S. 347, 354 (1979) (opinion of Stewart, J.) ('In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity.'); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) ('The different treatment of men and women . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service.' (emphasis in original)). This same principle has been recognized in the Title VII area. *See, e.g., Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981), *vacated because of mootness*, 671 F.2d 1100 (8th Cir. 1982) (recognizing the need to have female registered nurses care for obstetrical patients); *see also* I A. Larson & L. Larson, *Employment Discrimination—Sex* § 14.30 (1987) ('[G]iving respect to deep-seated feelings of personal privacy involving one's own genital area is quite a different matter from catering to the desire of some male airline passengers to have . . . an attractive stewardess.')"

Because scientific data available as of this date reflects that the risk of transmission of harm to unborn children is confined to fertile female employees, the sex-based distinction present in Johnson Controls' fetal protection policy is based upon real physical differences between men and women relating to childbearing capacity and is consistent with Title VII.

C. *Adequate But Less Discriminatory Alternatives*

We are cognizant of the fact that Johnson's fetal protection policy might very well not have been sustainable had the UAW presented facts and reasoning sufficient for the trier of fact to conclude that "there are 'acceptable

alternative policies or practices which would better accomplish the business purpose . . . [of protecting against the risk of harm], or accomplish equally well with a lesser differential . . . impact [between women and men workers].'" *Olin*, 697 F.2d at 1191 (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)).

As an initial matter, we must determine whether the UAW has preserved this issue for appeal. The UAW's brief explicitly admits that "the plaintiffs did not respond to the defendant's allegations that it had considered a number of alternatives [to its fetal protection policy]," UAW Brief at 37 n.14, and fails to present any of its own alternatives. Federal Rule of Appellate Procedure 28(a)(4) provides, in relevant part, that: "The brief of the appellant shall contain under appropriate headings and in the order here indicated: . . . (4) an argument. . . . The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." In *Zelazny v. Lyng*, 853 F.2d 540, 542 n.1 (7th Cir. 1988), we observed that:

> "We have said that an appellant is required by Rule 28(a)(4) of the Federal Rules of Appellate Procedure to present in his brief to the appellate court the issues that he desires to litigate and to support his arguments on those issues with appropriate judicial authority. *See Beard v. Whitley County REMC*, 840 F.2d 405, 408 (7th Cir. 1988). '"It is not the obligation of this court to research and construct the legal arguments open to parties especially when they are represented by counsel."' *Id.* at 408-09 (quoting *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056, 107 S. Ct. 933, 93 L.Ed.2d 984 1987)). Mr. Zelazny's conclusory remarks about his lack of diligence without any further argument on the issue and

> without any attempt to offer a justification for his delay do not comply with the strictures of Rule 28 (a) (4). Therefore, even if Mr. Zelazny disputes the district court's determination of inexcusable delay, he has waived any argument on that issue."

The UAW's failure to specifically articulate a less discriminatory alternative argument in the manner required in Federal Rule of Appellate Procedure 28(a) (4) means that it has failed to adequately present this issue to this court.

Even were we to conclude that the UAW had preserved this issue for appeal, we would be constrained to hold that the UAW failed to present facts sufficient for a trier of fact to conclude that less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates. In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126-27 (1989), the Supreme Court recently explained the burden a Title VII plaintiff must carry in order to establish that an employer's policy is invalid on the basis of the availability of less discriminatory alternatives:

> "[I]f . . . [plaintiffs] cannot persuade the trier of fact on the question of [the employer's] business necessity defense, [plaintiffs] may still be able to prevail. To do so, [plaintiffs] will have to persuade the fact finder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s];' by so demonstrating, [plaintiffs] would prove that '[the employers were] using [their] test merely as a "pretext" for discrimination.' *Albemarle Paper Co.* [*v. Moody*], 422 U.S. 405, 425 (1975)]; *see also Watson*, 487 U.S. at —— (O'Connor, J.); *Id.*, at —— (Blackmun, J.). If [plaintiffs], having established a prima facie case, come forward with alternatives to

> [the employers'] hiring practices that reduce the racially-disparate impact of practices currently being used, and [the employers] refuse to adopt these alternatives, such a refusal would belie a claim by [plaintiffs] that their incumbent practices are being employed for nondiscriminatory reasons.
>
> Of course, any alternative practices which [plaintiffs] offer up in this respect must be equally effective as [the employers'] chosen hiring procedures in achieving [the employers'] legitimate employment goals. Moreover, '[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practices in serving the employer's legitimate business goals.' *Watson* [*v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2790 (1988)] (O'Connor, J.). 'Courts are generally less competent than employers to restructure business practices,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring process in response to a Title VII suit."

The above passage from *Wards Cove* makes clear (1) that the UAW bears the burden of presenting specific economically and technologically feasible alternatives to Johnson Controls' fetal protection policy; (2) that if the UAW presents such alternatives, the UAW also bears the burden of demonstrating that its proposed alternative policy is "*equally* effective [as Johnson Controls' fetal protection policy] in achieving [Johnson's] legitimate employment goals," *Wards Cove*, 109 S. Ct. at 2127 (emphasis added); and (3) that this inquiry is to be undertaken with the recognition that "'[f]actors such as the cost or other burdens of proposed alternative selection devises are relevant in determining whether they would be

equally as effective as the challenged practices in serving the employer's legitimate business goals,'" *Id.* at 2127 (quoting *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2790 (19883 (O'Connor, J.)), and that "'[c]ourts are generally less competent than employers to restructure business practices' . . . ." *Id.* (quoting *Furnco Construction Corp.*, 438 U.S. at 578). In our case the inquiry is terminated at the first stage. The UAW, in its briefs and argument, has failed to present even one specific alternative to Johnson's fetal protection policy, much less a demonstration of how any particular economically and technologically feasible alternative would effectively achieve Johnson's purpose of preventing the risk of fetal harm associated with the exposure to lead of fertile female employees.

The record also demonstrates that viable alternatives to the fetal protection program were not presented to the court that would equally effectively further Johnson's legitimate interests. As detailed in Section I, *supra*, Johnson Controls itself considered various possible less discriminatory alternatives prior to its adoption of the current fetal protection policy in 1982. In considering these alternatives, Johnson realized that lead could not be eliminated as a battery component. Furthermore, technically and economically feasible alternatives in the manufacturing process are incapable of reducing lead exposure to acceptable levels for pregnant women.[31] Limitation of

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[31] *Cf. Sable Communications v. FCC*, 109 S. Ct. 2829, 2837-39 (1989). This was a First Amendment challenge to federal legislation outlawing dial-a-porn telephone services. In passing upon the constitutionality of this proscription, the Supreme Court observed that: "For all we know from the record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages." *Sable*, 109 S. Ct. at 2838. Thus, the Court concluded that "the congressional record contains no legislative findings that would justify us in concluding that there is no

the exclusion from high lead positions to women actually pregnant or planning pregnancy was inadequate because lead exposure frequently takes place during the time period before the woman or her doctor determine her pregnancy. In addition, reduction of blood lead levels following removal of a significant period of time that can extend well into the pregnancy term. Although the Supreme Court has noted that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster"[32] under the business necessity defense, Johnson's policy could well have met this exacting standard.

Finally, in resolving this issue we must act with an awareness of the Supreme Court's warnings that "'[c]ourts are generally less competent than employers to restructure business practices,'"[33] and that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's [proposed alternative employment policy] in response to a Title VII suit."[34] In light of these policies, the UAW has not met its evidentiary burden at the summary judgment phase of presenting facts from which a trier of fact could determine that an alternative policy would be equally as effective as Johnson Controls' fetal protection policy in preventing risk of harm to unborn children from lead exposure.

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constitutionally less restrictive means, short of a total ban, to achieve the government's interest in protecting minors." *Id.* In contrast, our case involves uncontroverted scientific and medical data supporting determinations that available technology would not adequately prevent hazards accompanying lead exposure. *Sable* is considered in more detail in Section V, *infra*.

[32] *Wards Cove*, 109 S. Ct. at 2126.

[33] *Wards Cove*, 109 S. Ct. at 2127 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. at 578).

[34] *Wards Cove*, 109 S. Ct. at 2127.

V.

Having just held that the business necessity defense shields an employer from liability for sex discrimination under Title VII in a fetal protection policy involving the type of facts present herein, we are also convinced that Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense.

In addressing the bona fide occupational qualification question, we have observed that: "It is universally recognized that this exception to Title VII was 'meant to be an extremely narrow exception to the general prohibition of discrimination. . . .'" *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523, 1527 (7th Cir. 1988) (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)). Nonetheless, this formulation should not be treated as inviting a black letter conclusion that the employer automatically loses in a case in which it is required to demonstrate a bona fide occupational qualification. The bona fide occupational qualification defense, like other Title VII defenses, must be construed in a manner which gives meaningful and thoughtful consideration to the *interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child.* Indeed, the fact that Johnson's fetal protection policy applies exclusively to the high lead exposure areas of its battery division demonstrates why the policy is drafted with sufficiently definite terminology as to constitute a "narrow exception to the general prohibition of discrimination . . . ."[35]

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[35] *Torres*, 859 F.2d at 1527 (quoting *Dothard*, 433 U.S. at 334). The battery division is only a small segment of Johnson Controls' entire business operation. Johnson Controls employs 25,700 employees, only 425 of whom work in its battery division. *See* Dan's Marketing Services, Inc., 1 *America's Corporate Families* 694 (1988).

In the context of the Pregnancy Discrimination Act,[36] application of the bona fide occupational qualification defense requires a court to consider the special concerns which pregnancy poses. A proposed BFOQ relating to capacity for pregnancy (or actual pregnancy) will exclude fewer employees than a BFOQ excluding all women. The court must also consider the physical changes caused by pregnancy, i.e., the presence of the unborn child, in determining whether the employee's continuance in a particular employment assignment will endanger the health of her unborn child. These concerns are in many ways quite similar to those a court should address in a business necessity defense analysis. Indeed, in considering a BFOQ defense in a case involving pregnancy, the Eighth Circuit recently stated:

> "[T]he district court's finding of business necessity itself is persuasive as to the existence of a bfoq. This court has noted that the analysis of a bfoq 'is similar to and overlaps with the judicially created "business necessity" test.' *Gunther* [*v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 n.2 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980)]. The various standards for establishing business necessity are quite similar to those for determining a bfoq."

Chambers v. Omaha Girls Clubs, Inc., 834 F.2d 697, 704 (8th Cir. 1987) (decision discussed favorably in *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523, 1531 (7th Cir. 1988) (en banc)).

Sitting *en banc*, this court recently considered the bona fide occupational qualification defense in *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523 (7th Cir. 1988) (en banc). At issue in *Torres* was the question of whether the Wisconsin Department of Health and Social Services could pursue its legitimate goal in

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[36] 42 U.S.C. § 2000e(k).

furthering prisoner rehabilitation through a policy excluding men from nineteen of twenty-seven guard positions in the living and hygiene areas of an exclusively women's prison institution. We noted with approval the traditional formulations of the business necessity defense. 859 F.2d at 1527. These formulations are that "'discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively,'" *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (emphasis in original)), and that "an employer [can] rely on the BFOQ exception only by proving 'that he had reason to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" *Id.* (quoting *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

We next discussed the need for courts conducting BFOQ analyses to avoid either using traditional stereotypes or falling into the equally unsatisfactory alternative of ignoring the real differences between men and women. We stated:

> "It is also well established that a BFOQ may not be based on 'stereotyped characterizations of the sexes.' *Dothard*, 433 U.S. at 333. . . . Nevertheless, while recognizing that sex-based differences may justify a limited number of distinctions between men and women, we must discipline our inquiry to ensure that our tolerance for such distinctions is not widened artificially by—as the district court aptly put it—our 'own culturally induced proclivities.' *Torres*, 639 F. Supp. at 278. Nor, of course, can we tolerate the same preconceptions or predilections on the part of employers. Rather, we must ask whether, given the reasonable objectives of the employer, the very womanhood or very manhood of the employee undermines his or her capacity to perform a job satisfactorily. *Dothard*, 433 U.S. at 336."

Torres, 859 F.2d at 1527-28.

Torres' conclusion that Congress intended the bona fide occupational qualification defense as a recognition of the real differences between men and women accords with Congress' approach in both Title VII and other contexts concerning matters involving distinctions based upon realistic physical differences between men and women. For example, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Supreme Court affirmed the exclusion of women from the military draft based upon a congressional determination that women were not suited for combat. The Court noted that

> "Congress specifically recognized and endorsed the exclusion of women from combat in exempting women from registration. In the words of the Senate Report:
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> > 'The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee . . . . Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy.'"

453 U.S. at 76-77 (quoting S. Rep. No. 96-826 at 157, U.S. Code Cong. & Adm. News 1980, 2647). Likewise, in *California Federal Savings & Loan Association v. Guerra*, 107 S. Ct. 683, 694 (1987), the Supreme Court recognized that in enacting Title VII Congress did not intend to preclude state pregnancy leave legislation which recognized "*actual physical disability* on account of preg-

nancy," (emphasis in original), and that did "not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers." Finally, Title IX requirements with respect to equality between men and women in athletic programs have been administratively interpreted to allow separate male and female teams and to permit exclusion of women from contact sports. *See* 7 C.F.R. § 15a.41(b), 10 C.F.R. § 1040.44(b), 34 C.F.R. § 106.41(b), 45 C.F.R. § 86.41(b). The risk of injury to women from contact sports is based upon the recognized innate physical differences between men and women, matters analogous to Johnson's fetal protection policy's concern with the differences between men and women relating to childbearing capacity. Thus, as *Torres* holds, the Title VII bona fide occupational qualification defense is another legitimate congressional recognition that real physical differences between men and women can and do justify differences in their treatment.

After establishing the general policies underlying the BFOQ defense, *Torres* set forth a method for ascertaining the validity of a BFOQ.

> "The validity of a BFOQ can only be ascertained when it is assessed in relationship to the business of the employer. Our first step, therefore, *must be to come to an understanding of the employer's business*—its mission and the methodologies necessary to fulfill that mission. *In accomplishing this task, we cannot deal in generalities. Rather, we must focus on the 'particular business' of the employer in which the protected employee worked.* Oftentimes, this task requires that a court recognize factors that make a particular operation of an employer unique or at least substantially different from other operations in the same general business or profession. *See Pime v. Loyola Univ.*, 803 F.2d 351, 353-54 (7th Cir. 1986) (upholding the maintenance of a Jesuit 'presence' as 'important to the successful operation of the University,' when there was evidence that it was 'significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus')."

Id. at 1528-29 (citations omitted, emphasis added). In the context of the administration of a state prison, we considered how a specific definition of a business could permit a bona fide occupational qualification in a case where a general definition of the business might not permit such a qualification:

> "Here . . . the broadest description of the 'business' of the defendants is to say that they are in the business of governance at the state level. This general description, standing alone, gives them no special license with respect to Title VII. . . . A more precise definition of the 'business' of the defendants is to recognize that they are in the business of administering a penal institution. Few tasks are more challenging.
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> This general description of the task of prison administrators is still too general to permit us to assess accurately the claims of the parties. . . . [W]e must . . . refine our focus. The defendants are charged with the administration of a distinct type of penal institution—a women's maximum security facility. . . . [T]he same historical and empirical evidence that might guide the administrator of a similar institution for males simply is not available with respect to this environment. Therefore, *the administrators . . . were obliged, to a greater degree than their counterparts in male institutions, to innovate in achieving one of the tasks mandated by the Wisconsin legislature—rehabilitation.* The defendants'

'business' explicitly included—by legislative mandate —the task of rehabilitation."

Torres, 859 F.2d at 1529-30 (emphasis added, citations omitted).

Torres bears particular relevance to our discussion of the description of Johnson Controls' business. At a broad level, Johnson's business, insofar as relevant to this case, is the manufacture of batteries.[37] Johnson's business is "unique" because it requires the use of lead, an extremely toxic substance that has been scientifically established to pose very serious dangers to young children and, in particular, to the offspring of female employees. In order to respond to the problems accompanying its unique battery manufacturing operation, Johnson Controls has properly made it part of its business to attempt to manufacture batteries in as safe a manner as possible. This safety interest is every bit as critical to the mission of Johnson's battery manufacturing business as rehabilitation of prisoners is to the mission of the prison facility at issue in *Torres*. Furthermore, like the prison in *Torres*, Johnson has found it necessary to "innovate" to achieve its essential goal of manufacturing batteries safely through the adoption of a fetal protection policy that would address the health safety problems related to its female employees significantly more effectively than the alternative policies it had considered. *See* Sections II and IV-C, *supra*.

Having established that industrial safety (preventing hazards to health) is legitimately part of the "essence" of the "business" of a battery manufacturer, as it is of any manufacturing enterprise, the next inquiry under *Torres* is whether Johnson Controls' fetal protection policy is "directly related" to industrial safety. See *Torres*, 859 F.2d at 1530. Certainly a policy is directly related

[37] As noted in footnote 34, *supra*, Johnson Controls' battery division is only a small segment of its entire business operation.

to industrial safety when it protects unborn children from a substantial risk of devastating and permanent impairment or loss of intellectual ability or injury to vital organs resulting from exposure to a toxic industrial chemical.

As in *Torres*, "[t]he more difficult question is whether the proposed BFOQ [is] 'reasonably necessary' to furthering the objective of [industrial safety]." *Torres*, 859 F.2d at 1530. In "unique" businesses, like the living areas of the women's prison in *Torres* or Johnson Controls' battery manufacturing operation, where an employer adopts an employment policy designed to address a difficult societal problem, *Torres* requires that courts reviewing such a determination under Title VII give some deference to the employer's decisions. As we noted in *Torres*:

> "We believe . . . that the defendants were required to meet an unrealistic, and therefore unfair burden when they were required to produce 'objective evidence, either from empirical studies or otherwise, displaying the validity of their theory.' *Torres* [*v. Wisconsin Dept. of Health and Social Services*, 639 F. Supp. 271, 280 (E.D. Wis. 1986)]. Given the nature of their 'business'—administering a prison for female felons—the defendants, of necessity, had to innovate. Therefore, their efforts ought to be evaluated on the basis of the totality of the circumstances as contained in the entire record. In the Title VII context, the decision of penal administrators need not be given as much deference as accorded their decisions in constitutional cases. However, their judgments still are entitled to substantial weight when they are the product of a reasoned decision making process, based on available information and experience."

859 F.2d at 1532 (citations omitted). *Cf. Wards Cove*, 109 S. Ct. at 2127 (" 'Courts are generally less competent

than employers to restructure business practices,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate [employment practice] in response to a Title VII suit.").

In resolving the question of whether Johnson Controls' BFOQ is reasonably necessary to industrial safety, we recognize that Title VII establishes the general propositions that a determination of whether a proposed BFOQ is "reasonably necessary" to furthering the objective of industrial safety requires that Johnson Controls "'had reasonable cause to believe, that is, a factual basis for believing that all or substantially all [women capable of pregnancy] would be unable to perform safely and efficiently the duties of the job involved,'" *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969)), and that "[i]n the *usual* case, the argument that a particular job is too dangerous for *women* may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the *individual woman* to make that choice for *herself*." *Dothard*, 433 U.S. at 335 (footnote omitted, emphasis added). *It is important to remember, however, that while Dothard established these propositions as general rules, the Supreme Court determined that Dothard was an unusual case justifying a departure from this general maxim.* The Court stated: "More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum security male prison." *Id.* The Court concluded that a bona fide occupational qualification excluding women from such positions was justified because a woman's sex could create a risk of sexual assaults which would undermine prison security. *See Id.* at 335-37.

Similarly, "[m]ore is at stake in this case . . . than an individual woman's decision to weigh and accept the risks of employment." *Id.* at 335. A female's decision to work in a high lead exposure job risks the intellectual and physical development of the baby she may carry. The status of women in America has changed both in the family and in the economic system. Since they have become a force in the workplace as well as in the home because of their desire to better the family's station in life, it would not be improbable that a female employee might somehow rationally discount this clear risk in her hope and belief that her infant would not be adversely affected from lead exposure. The unborn child has no opportunity to avoid this grave danger, but bears the definite risk of suffering permanent consequences. This situation is much like that involved in blood transfusion cases. There courts have held that individuals may choose for themselves whether to refuse to personally acquiesce in a blood transfusion that had been established as medically necessary, but that parents may not always rely upon parental rights or religious liberty rights to similarly refuse to consent to such a medically necessary transfusion for their minor children.[38] The risks to the unborn child from lead are also shared by society in the form of government financed programs to train or maintain a handicapped child in non-institutional or institutional environments and to provide the child with the training necessary to overcome the mental and physical harm attributable to lead exposure.[39] Thus, since "more

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[38] In these cases a court will commonly appoint a guardian *ad litem* with the authority to consent for the child to the required transfusion and will hold a hearing to determine whether the child has been medically neglected as a result of the denial of the transfusion. *See generally In re E. G.*, 161 Ill.App.3d 765, 515 N.E.2d 286, 287 (1987), *appeal allowed*, 520 N.E.2d 385 (1988).

[39] *Cf. State v. Acker*, 26 Utah 2d 104, 485 P.2d 1038, 1039 (1971); *Love v. Bell*, 465 P.2d 118, 121 (Colo. 1970) (Costs to society from caring for motorcycle accident victims support mandatory motor-

is at stake" than the individual woman's decision to risk her own safety, *Dothard* supports, rather than bars, a conclusion that an employer's fetal protection policy constitutes a bona fide occupational qualification. In such circumstances, "given the reasonable objectives of the employer, the very womanhood . . . of the employee undermines . . . her capacity to perform a job satisfactorily." *Torres*, 859 F.2d at 1528 (citing *Dothard*, 433 U.S. at 336).

Against this substantive background, we hold that Johnson has carried its burden of demonstrating that its fetal protection plan is reasonably necessary to further

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cycle helmet laws in states that have these laws). As the Supreme Court of Washington, sitting *en banc* observed:

> "The legislature could also reasonably assume—and legislate on such assumption—that the public welfare and safety is substantially affected by the dangers arising from motorcycle riding. The public has already assumed many burdens and responsibilities in helping ameliorate the effects of accidents. It has at public expense substantially provided emergency ambulance, medical and hospital care for persons injured on the public highways and supplied medical, surgical and hospital services for indigent persons so injured. The public has undertaken the basic responsibility of policing the public highways and regulating traffic thereon both in the interests of safety and efficiency, and has utilized the state and its political subdivisions to carry these burdens. The greater the number of serious injuries to the head and upper spine suffered by motorcycle riders, the greater the burdens it can reasonably be said are imposed on the publicly supplied or regulated medical, hospital, ambulance and police services. There thus exists a reasonably manifest connection between the use of protective helmets by motorcycle riders and the public health, welfare and safety. Accordingly, requiring motorcycle riders to wear protective helmets of a type approved by the state commission on equipment when riding upon the public highways is a legitimate and reasonable exercise of the police power, and RCW 46.37-530(3) is a constitutional declaration thereof."

State v. Laitinen, 77 Wash. 2d 130, 459 P.2d 789, 791-92 (1969), *cert. denied*, 397 U.S. 1055 (1970).

industrial safety, a matter we have determined to be part of the essence of Johnson Controls' business. Initially, there can be no doubt that the exclusion of women who are actually pregnant from positions involving high levels of lead exposure sets forth a bona fide occupational qualification. As established in section II, *supra*, there is clear and unrefuted evidence in the record of a substantial and irreversible risk to the unborn child's mental development from lead exposure in the womb. This danger is "hardly a '[m]yth or purely habitually assumption.'" *Torres*, 859 F.2d at 1531 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)). The convincing scientific evidence of this risk and the very serious consequences of this danger combine to make this health risk quite different from the concerns in *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908), which we would currently characterize as stereotypical rather than real. *Compare Dothard*, 433 U.S. at 333 (noting "that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes"); *Torres*, 859 F.2d at 1527-28 (distinguishing between "stereotyped characterizations of the sexes" and "real . . . differences between men and women").

We are also of the opinion that Johnson Controls' well reasoned and scientifically documented decision to apply this policy to all fertile women employed in high lead exposure positions constitutes a bona fide occupational qualification. The evidence presented concerning the fingering effects of lead in a woman's body, combined with the magnitude of medical difficulties in detecting and diagnosing early pregnancy, lead us to agree with Johnson Controls that there exists a reasonable basis in fact to conclude that an extension of this policy to all fertile women is proper and reasonably necessary to further the industrial safety concern of preventing the unborn child's exposure to lead.

Based upon the current status of research into lead's hazardous effects, we also agree that Johnson Controls has demonstrated to our satisfaction that exclusion of fertile women from positions in any area of its battery plant in which an employee has reported a blood lead level in excess of 30 μg/dl or where an air lead measurement has been in excess of 30 is reasonably necessary to the industrial safety-based concern of protecting the unborn child from lead exposure. At the time Johnson Controls adopted its policy, the 30 μg/dl lead exposure level coincided with the Centers for Disease Control's determination of acceptable blood lead levels for children. *See* n.7, *supra*. However, it is becoming increasingly clear that the 30 μg/dl lead exposure level once believed to be safe for unborn children is no longer medically accepted as risk free. As mentioned previously, the Centers for Disease Control, in 1985, based upon "current knowledge concerning screening, diagnosis, treatment, followup, and environmental intervention for children with elevated blood levels," revised the level of elevated lead exposure from 30 to 25 μg/dl and suggested that an unborn child's blood lead level remain below 25 μg/dl. As also noted previously, recent lead studies suggest that harm may be present at levels even lower than those earlier believed to be safe.[40] Thus, lead absorption levels such as those mandated by OSHA, which were thought to have been sufficiently protective of the unborn child when they were enacted over ten years ago, are now considered insufficient. Medical knowledge is, indeed, a rapidly changing field as was noted in an early opinion:

> "Surgical techniques have changed rapidly over the years . . . . Advances such as the transplating of a heart and kidneys in the 1950's and 1960's or the reattachmnet of a severed hand or arm were unthought of many years ago. Future advances, particularly, in teaching hospitals, will be too extraordinary to even predict."

Rod v. Farrell, 96 Wis.2d 349, 359, 291 N.W.2d 568, 573 (1980) (Coffey, J., concurring). Recent advances in scientific knowledge demonstrate that Johnson Controls' cautious approach has been consistent with the emerging knowledge that the unborn child may be adversely affected by lead levels below those permitted by OSHA standards. An example of a similar practice found in everyday experience is the medical and dental professions' extreme care and caution in the use of X-ray procedures on pregnant women. These procedures are generally avoided during pregnancy and, when absolutely necessary, are performed in manners designed to minimize any possible danger to the unborn child.

The analysis that we have conducted under the bona fide occupational qualification standards of Title VII is analogous to the approach the Supreme Court took in the First Amendment context in *Sable Communications v. F.C.C.*, 109 S. Ct. 2829 (1989). There the Supreme Court dealt with the question of whether Congress' ban on "dial-a-porn" services was narrowly tailored to serve a compelling governmental interest "in protecting the physical and psychological well-being of minors,"[41] very similar to Johnson's interest in protecting the health of the unborn through the female employee. In the constitutional context, as in the bona fide occupational qualification context, when an entity attempts to further this type of interest it must be accomplished with " 'narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms,' " [42] or, in this case, Title VII rights. The

[40] *See* J. N. Davis and D. Svendsgaard, *Lead and Child Development*, 329 Nature 297 (1987) (collecting results of recent studies in this area).

[41] *Sable*, 109 S. Ct. at 2836.

[42] *Id.* (quoting *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (citations omitted)).

Court went on to apply this analysis in considering the same type of question at issue in this case, whether the current status of technology requires a "total ban" or whether there are alternatives which would less comprehensively restrict the involved rights while still effectively furthering the relevant institutional interests. The Court determined that Congress' enactment was improper based upon its conclusion that "the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." *Sable*, 109 S. Ct. at 2838. The Court's analysis began:

> "The Government . . . argues that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive. The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. The Court of Appeals, after careful consideration, agreed that these rules represented a 'feasible and effective' way to serve the Government's compelling interest in protecting children. [*Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir.) (*Carlin III*), *cert. denied*, 109 S. Ct. 305 (1988)]."

Sable, 109 S. Ct. at 2837. The Supreme Court went on to note that it disagreed with the government's assertion that it had determined that there was not a technologically feasible means to further its interests other than through a complete ban. The Court set forth the government's position:

> "The Government now insists that the rules would not be effective—that enterprising youngsters could

> and would evade the rules and gain access to communications from which they should be shielded. There is no evidence in the record before us to that effect nor could there be since the FCC's implementation of § 223(b) prior to its 1988 amendment has never been tested over time. In this respect, the Government asserts that in amending § 223(b) in 1988, Congress expressed its view that there was not a sufficiently effective way to protect minors short of the total ban that it enacted. The Government claims that we must give deference to that judgment."

Id. The Court in its rejection of this position stated:

> "[T]he congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors.
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> There is no doubt Congress enacted a total ban on both obscene and indecent telephone communications. But aside from conclusory statements during the debate by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, that under the FCC regulations minors could still have access to dial-a-porn messages, the Congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be. It may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access a dial-a-porn system. . . . No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages. On the other hand, in the hearings on H.R. 1786, the Committee heard testimony from the FCC and other

witnesses that the FCC rules would be effective and should be tried out in practice. . . .

For all we know from the record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages. If this is the case it seems to us that § 223(b) [the total ban] is not narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages."

Id. at 2838-39 (citations and footnotes omitted, emphasis in original). In contrast to the government in *Sable*, as noted above, Johnson Controls research, innovated and spent at least $15 million in lead control policies and has been unable to devise a policy other than the exclusion of fertile women from high lead exposure positions that would be capable of adequately serving Johnson's legitimate interest in protecting the health of the unborn. There has been no convincing exposition in the record of any suitable alternative or of scientific, medical or technical evidence supporting the efficacy of such an alternative. We believe that in a bona fide occupational qualification case, as in a business necessity case, we are constrained by the maxim that: " 'Courts are generally less competent than employers to restructure business practices,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt [an alternative employment practice] in response to a Title VII suit." *Wards Cove*, 109 S. Ct. at 2127. Accordingly, the absence of economically and technologically feasible alternatives to Johnson Controls' fetal protection policy also supports a bona fide occupational qualification determination.

There is a reasonable basis in fact, grounded in medical and scientific research data, for concluding that Johnson

Controls' has met its burden of establishing that the fetal protection policy is reasonably necessary to industrial safety.[43] Thus, the fetal protection policy should be recognized as establishing a bona fide occupational protecting the policy against claims of sex discrimination.

VI.

A business necessity defense should be applied to a challenge to a fetal protection policy under Title VII. Johnson Controls has produced facts which would demonstrate the availability of such a defense and the UAW has failed to carry its burden of persuasion through exposition of facts necessary to present a genuine issue of material fact with respect to the absence of such a defense. Even if the bona fide occupational qualification defense is applied to this matter, Johnson Controls has demonstrated that its fetal protection policy is reasonably necessary to industrial safety. Thus, the district court's entry of summary judgment in favor of Johnson Controls is

AFFIRMED.

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[43] Judge Easterbrook suggests that "by one estimate 20 million industrial jobs could be closed to women," if "the majority is right," "for many substances in addition to lead pose fetal risks." Easterbrook Dissent at 96. This assertion is based upon the following language in Bureau of National Affairs' Special Report, *Pregnancy and Employment* p. 57 (1987): "One government source estimates that 15 million to 20 million jobs in the United States expose workers to chemicals that *may* cause reproductive injury." (Emphasis supplied). This speculative statement, taken at its face value, merely suggests a possibility of reproductive injury from unidentified and undefined toxic substances. Before our decision could be applied to any of these unidentified substances, obviously they would have to be subjected to the myriad tests and research that have conclusively established the grave risk from lead substances. Thus, an employer presenting a business necessity or bona fide occupational qualification defense would have to establish that the substance had undergone the same rigid testing and research. In addition, if ever a lead-free battery were developed, the problems in this case would fall by the wayside. We hope that this is achieved tomorrow.

CUDAHY, *Circuit Judge*, dissenting:

I respectfully dissent from the majority opinion. I would be pleased to join almost all of Judge Easterbrook's eloquent dissent except for its disposition of the case. Here I join Judge Posner's equally cogent statement, which adopts the BFOQ standard but advocates remand for a full trial on that basis. It may (and should) be difficult to establish a BFOQ here but I would afford the defendant an opportunity to try.[1] I agree with Judge Easterbrook that this "is likely the most important sex-discrimination case in any court since 1964 . . ." and its painful complexities are manifestly unsuited for summary judgment. In any event, BFOQ defense is clearly the only one the statute allows in this disparate treatment case. It is unfortunate that the majority gives a

[1] On this issue, I disagree with Judge Easterbrook's conclusion that the BFOQ standard could *never* be satisfied in a case such as this. As Judge Posner's dissent suggests, the BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking. However, the employer must demonstrate "a factual basis for believing that all or substantially all women would be unable to perform safely [i.e., without inordinate risk to third parties, including fetuses] and efficiently the duties of the job involved." *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969). As Judge Easterbrook notes in discussing the disposition of this case under the *Wright-Hayes* standard, substantial factual questions remain concerning whether occupational exposure to lead presents a substantial risk to the fetus, whether this risk is transmitted only through the pregnant woman and whether less restrictive alternatives would adequately safeguard the employer's interest in fetal health and safety. So long as it is understood that the burden to prove these matters rests on the employer, and that this burden may not be met by unsubstantiated hypotheses or claims of scientific uncertainty, *see Torres v. Wisconsin Dep't of Health & Social Servs.*, 859 F.2d 1523, 1533-34 (7th Cir. 1988) (en banc) (Cudahy, J., dissenting), I am comfortable with allowing the employer at least the opportunity to attempt to meet this demanding standard.

new life of sorts to the result-oriented gimmickery of *Wright v. Olson Corp.*, 697 F.2d 1172 (4th Cir. 1982).

It is a matter of some interest that, of the twelve federal judges to have considered this case to date, none has been female. This may be quite significant because this case, like other controversies of great potential consequence, demands, in addition to command of the disembodied rules, some insight into social reality. What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but weil-fed, housed and doctored? Whose fetus is at greater risk? Whose decision is this to make? We, who are unfortunately all male, must address these and other equally complex questions through the clumsy vehicle of litigation. At least let it be complete litigation focusing on the right standard.

POSNER, *Circuit Judge*, dissenting. Johnson Controls refuses to employ any woman to make batteries unless she presents medical evidence of sterility. Today this court holds that refusal lawful under Title VII. A reader of the majority opinion might be excused for thinking that the case had been fully tried—and before this court—rather than decided by a district judge on a motion for summary judgment. I think it a mistake to suppose that we can decide this case once and for all on so meager a record. It is a mistake whether we affirm, on the ground that the evidence of danger to the fetus of a woman working in an environment dense with airborne lead, combined with evidence of the difficulty of reducing the amount of lead any further, conclusively establishes the lawfulness of Johnson Controls' policy, or reverse, with directions to enter judgment for the plaintiffs, on the ground that Title VII outlaws all fetal protection policies because all bear more heavily on female than on male workers.

Title VII forbids an employer deliberately to exclude a worker from a particular job because of the worker's sex unless sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2 (e)(1). This defense is central to the appeal and we should attend carefully to its scope and meaning. It is written narrowly and has been read narrowly. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977); *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523, 1527-28 (7th Cir. 1988). There is no useful legislative history concerning the defense, and—no doubt because the prohibition of sex discrimination was added to Title VII at the last minute—no reference at all to the application of the defense to sex discrimination. A narrow reading is, nevertheless, inevitable. A broad reading would gut the statute. For it is unlikely that most employment discrimination in the private sector is irrational. Few private employers discriminate without having some reason for doing so; competition tends to drive from the market firms that behave irrationally. See Becker, The Economics of Discrimination (2d ed. 1971). If the defense of bona fide occupational qualification were broadly construed—for example, to excuse all sex discrimination that the employer could show was cost-justified—very little sex discrimination in employment, as well as very little employment discrimination based on religion or national origin (forms of discrimination that, like sex discrimination but unlike discrimination based on race or color, are also excused if a bona fide occupational qualification is established), would be forbidden. Title VII's reach would be shortened drastically.

Two courts of appeals faced with challenges under Title VII to fetal protection policies have concluded that such policies can never satisfy the stringent requirements of the occupational qualification defense. See *Wright v. Olin Corp.*, 697 F.2d 1172, 1185 (4th Cir. 1982); *Hayes v.*

Shelby Memorial Hospital, 726 F.2d 1543, 1549 (11th Cir. 1984). But this conclusion, rather than resulting in instant victory for the plaintiffs, led those courts to stitch a new defense expressly for fetal protection cases. See 697 F.2d at 1183-92; 726 F.2d at 1548-54. I am not myself deeply shocked that courts sometimes rewrite statutes to address problems that the legislators did not foresee—a notable but not isolated example being the judicial interpolation of the word "reasonable" into section 1 of the Sherman Act to prevent that atomization of society that Justice Holmes so feared. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978); *Northern Securities Co. v. United States*, 193 U.S. 197, 410 (1904) (Holmes, J., dissenting). Speaking of Holmes, he wrote a splendid opinion holding that a requirement in the Massachusetts constitution of a "written vote" could be satisfied by a voting machine that involved no writing. See *In re House Bill No. 1,291*, 178 Mass. 605, 60 N.E. 129 (1901). And in the famous "murdering heir" case, *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), the court in effect inserted the words "unless the legatee murdered his testator" into a statute that entitled legatees to inherit under wills executed with the proper formalities. (Notice the age of these last two cases; they were not the work of newfangled judicial activists.) Recently the First Circuit struck two words from a federal statute to make it make sense. See *United States v. Colon-Ortiz*, 866 F.2d 1, 11 (1st Cir. 1989). There are many similar examples. I do not think judges must or should ratify absurd results by sticking doggedly to the plain meaning of statutory language.

But we do not need to bite this bullet here, because the wording of the occupational qualification provision is not so cramped that it has to be stretched to bring (some) fetal protection policies within its scope. Cf. *Pime v. Loyola University*, 803 F.2d 351, 356-57 (7th Cir. 1986)

(concurring opinion). Nor is a defensible way of stretching it to recast what is plainly a disparate treatment case—that is, a case of intentional discrimination against a protected group—as a disparate impact case, and then invoke the recent decision in which the Supreme Court expanded the "business necessity" defense. See *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989); also *Allen v. Seidman*, No. 88-1811 (7th Cir. July 27, 1989). This legerdemain is as unnecessary as it is questionable. "[R]easonably necessary," one of the key terms of the occupational qualification defense, means more than just reasonable but less than absolutely necessary. On the way to concluding that the defense is unavailable in fetal protection cases the court in *Wright* misquoted the provision by leaving out the word "reasonably," see 697 F.2d at 1185 n. 21, and the misquotation is faithfully repeated in *Hayes*, see 726 F.2d at 1549. The other key words of the defense, "*normal* operation" (emphasis added), should dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded. It is possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal. To confine the occupational qualification defense to concerns with price and product quality would deny a defense to Johnson Controls even if the company excluded only pregnant women, as distinct from all women who might become pregnant, from making batteries. I do not understand the plaintiffs to be arguing that Title VII requires Johnson Controls to permit women known to be pregnant to continue working in an atmosphere dense with lead. If on the other hand a fetal protection policy that excludes women from a given job classification cannot be said to be reasonably necessary to the employer's normal operation, I do not see

why we should *want* to save it from condemnation under Title VII.

I have described what I conceive to be the scope of the bona fide occupational qualification defense, and its application to sex discrimination, as of the original enactment of Title VII. I must now consider the bearing of the Pregnancy Discrimination Act of 1982, which amended Title VII by defining sex discrimination to include discrimination on the basis of pregnancy. The only section amended was the definition section, 42 U.S.C. § 2000e (k). The prima facie case of sex discrimination was broadened; the defenses remained unchanged. Maybe *Scherr v. Woodland School Community Consolidated District No. 50*, 867 F.2d 974, 978 (7th Cir. 1988), goes too far in saying that "as a definition amendment, the PDA provides no substantive rule to govern pregnancy discrimination." For one thing, the amendment shows that the present case really is a disparate treatment case, that is, a case of intentional discrimination that can be excused only if the defendant establishes a bona fide occupational qualification; the amendment makes fertile women, the group that Johnson Controls deliberately excluded from a job classification, a group protected by Title VII. The amendment also helps us understand that the occupational qualification defense could not be merely a cost justification or reasonable relation defense, for if it were, the amendment would be ineffectual. Any employer can prove that it costs *something* to make an accommodation for pregnant or potentially pregnant workers and therefore it is rational not to make the accommodation. But we already knew the defense was a narrow one.

The defense is applicable to this case and although it is of limited scope it is not the proverbial eye of a needle. In particular, the "normal operation" of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties. An

employer might be validly concerned on a variety of grounds both practical and ethical with the hazards of his workplace to the children of his employees. A pregnant employee exposed to heavy concentrations of lead in the air may absorb the lead into her bloodstream and from there transmit it to her fetus through the placenta, causing, years later, mental retardation or other injury to the child. The parties agree that there is a solid medical basis for concern with fetal injury from airborne lead in the concentration found in battery plants, and this concern could in turn cause the employer to worry about being sued by injured children of his employees. Such a suit would not be preempted by workers' compensation law, because the plaintiff would not be the worker. The employer would therefore be exposed to full common law damages, punitive as well as compensatory. The mother's own negligence—for if she had been clearly warned of the hazard, but voluntarily became pregnant anyway and continued to work making batteries, she would be acting negligently with regard to the fetus—would not be imputed to the child and therefore would not reduce the employer's liability. See, eg., *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 200 n. 14, 342 N.W.2d 37, 53 n. 14 (1984); *In re Estate of Infant Fontaine*, 519 A.2d 227, 230 (N.H. 1986); *Fabianke v. Weaver*, 527 So. 2d 1253, 1258 (Ala. 1988). It would merely make the mother a joint tortfeasor with the employer. Moreover, she might not be negligent; the pregnancy might be involuntary, and lead can injure the fetus before the mother knows she is pregnant.

Some courts have said that to create liability, the injury to the fetus must occur after the fetus has become viable (able to survive outside the mother's body). And as I just noted, lead in the mother's bloodstream can enter the fetus very early in the pregnancy—this presumably is the reason that Johnson Controls' fetal protection policy is so strict. But the distinction between

injury to the fetus before it becomes viable and injury after makes no sense with regard to tort liability—since the plaintiff is the child, not the fetus—and has generally and correctly been rejected. See, e.g., *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); *Bergstreser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978); Prosser and Keeton on the Law of Torts § 55, at pp. 368-69 (5th ed. 1984).

Other questions concerning tort liability remain unanswered—in particular whether the standard of liability is negligence or strict liability and whether compliance with OSHA's rules on safe levels of airborne lead is a defense. As a result it is difficult to estimate Johnson Controls' exposure to tort liability, but it would be premature, in this age of mass-tort suits (which for example drove the asbestos industry into bankruptcy), to dismiss it as trivial. The possibility of tort suits against battery manufacturers for lead injury to the child of a female employee is not merely a theoretical one. There has already been one reported case; the plaintiff got to a jury, but lost. See *Security National Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D. Kan. 1985). It is true that Johnson Controls has not yet attempted to document its liability concerns (one can understand the company's reluctance, by drawing public attention to its exposure to tort liability, to invite suits). But in moving for summary judgment the company was not required to present all its evidence to the district judge on pain of being barred from presenting it at the trial and I believe should be held to determine whether sex is a bona fide occupational qualification for making batteries.

We should not dismiss the concern over tort liability as a narrow, selfish "bottom line" concern irrelevant to the purposes of Title VII. The potential cost of tort liability to Johnson Controls is an approximation of the potential cost to the children who have suffered prenatal injury from the airborne lead absorbed into their mothers'

bloodstreams. That is a social cost that Title VII does not require a company to ignore. At some point it may become large enough to affect the company's normal method of operation and supply the ground for a bona fide occupational qualification of infertility.

A related point is that an employer might have moral qualms about endangering children or might fear the effect on his public relations. The ethical concern cannot be wholly dismissed, as could an ethical conviction that a woman's place is in the home. We know from the controversy over abortion that many people are passionately protective of fetal welfare, and they cannot all be expected—perhaps they cannot be required—to park their passions at the company gate. That "strong [state] interest in protecting the potential life of the fetus" of which the Supreme Court spoke in *Maher v. Roe*, 432 U.S. 464, 478 (1977), and other cases is not a judicial invention; it is the product of a groundswell of powerful emotion by a significant part of the community, and is only indirectly, although possibly substantially, in conflict with women's workplace aspirations. Granted, in *Doe v. First National Bank*, 865 F.2d 864, 873 (7th Cir. 1989), we assumed that the Pregnancy Discrimination Act forbids an employer to fire a woman for having an abortion, and although the point had not been argued our assumption may well have been correct. See H. Conf. Rep. No. 1786, 95th Cong., 2d Sess. 4 (1978) ("no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion"). If so, the result is to place a limitation on an employer's effort to protect fetal life. But the Pregnancy Discrimination Act affects only the prima facie case of sex discrimination. The defenses are untouched. No defense of bona fide occupational qualification was pleaded in *Doe*.

If the hazard to the fetus from airborne lead in the mother's workplace is sufficiently great, if the amount of

lead in the environment cannot be reduced without discontinuing the production of batteries, and if experience demonstrates that some women will become pregnant even after being clearly warned of the hazards to which the fetus would be exposed (there are many careless pregnancies, as is shown by the frequency of abortion and of illegitimate birth), I can find nothing in the text of the statute, or in its history or purpose, to prevent an employer from defending his refusal to allow fertile women to work in jobs in which they are exposed to dangerous concentrations of airborne lead on the ground that such refusal is reasonably necessary to the normal (civilized, humane, prudent, ethical) operation of his particular business. It is a matter of degree, and this we cannot assess on a summary judgment record. Of course the acceptance of the defense might be a hardship for those women who, though fertile, would not become pregnant. But hardship for the plaintiff is a possibility whenever a defense is sustained. It is no more than a possibility here, as we shall see.

Let us not be deceived by superficial historical analogies or facile invocations of "paternalistic." It is true that laws discriminating against women were once defended on the basis of a compelling social interest in protecting their fitness to bear and raise children, see, e.g., *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908), that this ground may have masked a desire to prevent women from competing with men for jobs (in any event this may have been the effect, see Landes, *The Effect of State Maximum Hours Laws on the Employment of Women in 1920*, 88 J. Pol. Econ. 476 (1980)), and that many modern American women resent the suggestion that women have a special responsibility for perpetuating the human race. But we do not have a discriminatory *law* here. A law that commands all employers in a given line of business to treat women specially cannot be equated to a decision by a firm in a competitive market to treat them specially,

if only because in the latter case other firms are free to follow a different course. There is also a difference between protecting women against themselves as well as protecting children, and protecting an employer and his employees' unborn children. A paternalistic measure is one that protects a person against himself, and insofar as Johnson Controls was motivated in adopting its fetal protection policy by concern with tort liability or adverse public relations, it was acting to protect its own interests. A fetus, moreover, is a different person (or protoperson) from its mother, and not all pregnant women fully internalize the welfare of their fetus, infant, or child. There are plently of selfish and irresponsible parents, not all of whom are male. A fetal protection policy is less paternalistic than a maximum-hours law.

I conclude that Title VII even as amended by the Pregnancy Discrimination Act does not outlaw all fetal protection policies. Whether a particular policy is lawful is a question of fact, and since the burden of proof is on the defendant it will be the rare case where the lawfulness of such a policy can be decided on the defendant's motion for summary judgment. This is not that rare case. Even if we accept that the amount of airborne lead in Johnson Controls' battery-making operation is dangerous to the fetuses of female employees and that the company cannot reduce the danger further without shutting down the operation, a host of unanswered questions remains. The first concerns the feasibility of warnings as a substitute for a blanket exclusion of all fertile women. Before Johnson Controls adopted the blanket exclusion, eight women employed in the battery operation had become pregnant in three years. But we do not know what fraction of women employed in the operation this was, because—remarkably—the record does not reveal the number of women employed in the operation. And the only warning that was in effect during that period was one more likely to allay than to arouse concern. It

compared the fetal hazards of airbrone lead to those of cigarette smoking, and many women do not believe that smoking is highly hazardous to the fetus. The plaintiffs believe that a real "scare" warning would have deterred those eight pregnancies; maybe they are right.

We do not know what other manufacturers of batteries do about the hazards of airborne lead to the fetus—whether they are content to rely on warnings, for example, and if so of what kind and with what effect. Apparently General Motors once had a fetal-protection policy identical to that of Johnson Controls, see Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex. L. Rev. 1025, 1058 n. 198 (1977); I have no idea whether it still does. The evidence of record concerning the potential hazard to the fetus through a father exposed to airborne lead is fragmentary and stale, yet if that hazard is significant the fact that Johnson Controls does nothing about it undermines the company's argument that its fetal protection policy is motivated by concern for the fetus and reasonably necessary to the operation of the battery business. See *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 998-99 (5th Cir. 1984). The evidentiary gap is due in part to the fact that the record on which the district judge based his grant of summary judgment was closed two and half years ago. A further consequence of the aging of the record is that we lack up-to-date information on the hazards of airborne lead to the fetus even through the mother. The record is also blank on the wages and alternative employment opportunities of the women employed in Johnson Control's battery operation. These data would be pertinent to the plaintiffs' ingenious although speculative argument that by depriving women of high-paying jobs, fetal protection may reduce women's expenditures on fetal and child care, possibly harming the fetus and child as much as do the environmental hazards against which those policies are directed.

We also do not know how profitable the business of manufacturing batteries is, and therefore how vulnerable it is to fears, as yet speculative, of litigation arising from fetal damage. (The case at this stage is a tissue of speculation.) Apparently a vaccine was once withdrawn temporarily from the market because of fears of possible litigation, see H.R. Rep. No. 908, 99th Cong., 2d Sess. 6 (1986); see generally Gaskins, Environmental Accidents: Personal Injury and Public Responsibility 161-62 (1989), and the lower the profit margin in making batteries the more plausible a concern with possible litigation becomes. The plaintiffs would have won a Pyrrhic victory if as a result of their winning this suit Johnson Controls shut down its battery operation, or if, as has happened with so many products formerly manufactured in this country, production shifted overseas and American automobile makers—which already use plenty of imported components—imported batteries made by companies that may have no regard either for fetal safety or for women's welfare. If Johnson Controls terminated its battery operation as a result of this suit, the plaintiffs would be in the same position as if the occupational qualification defense had prevailed except that they might—which is to say, realistically, that their lawyers might—recover attorney's fees. A "failing company" or "failing division" component of the occupational qualification defense makes at least as much sense as the counterpart provision in antitrust law.

Even on the limited record before us, however, it is clear that the defendant's fetal protection policy is excessively cautious in two regards: first in presuming that any woman under the age of 70 is fertile, and second in excluding a presumptively fertile woman from any job from which she might ultimately be promoted into battery making, even if her present job does not expose her to lead. Since these aspects of the policy are severable from the rest of it I do not think their deficiencies need

condemn the entire policy, especially since the first is harmless because a woman too old to bear children has only to submit a letter to that effect from her doctor to be permitted to work in the battery plant. But these deficiencies do underscore the precipitancy of deciding this case in the defendant's favor on the basis of the present record. It is not enough that an employer has *some* reason for adopting a policy that discriminates against women. Otherwise *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), which struck down gendered annuity tables, would have come out the other way. Yet it would be a mistake to infer from *Manhart* that policies that lump all (or most) women into a class for unfavorable treatment are therefore unlawful per se. They are discriminatory, but this just means that the employer must shoulder the burden of establishing that the classification which excludes women is reasonably necessary to the normal operation of his business. That the occupational qualification defense remains available in such case is implicit in the Court's discussion of the defense in *Manhart*. See *id.* at 716 n. 30.

The issue of the legality of fetal protection is as novel and difficult as it is contentious and the most sensible way to approach it at this early stage is on a case-by-case basis, involving careful examination of the facts as developed by the full adversary process of a trial. The record in this case is too sparse. The district judge jumped the gun. By affirming on this scanty basis we may be encouraging incautious employers to adopt fetal protection policies that could endanger the jobs of millions of women for minor gains in fetal safety and health.

But although the defendant did not present enough evidence to warrant the grant of summary judgment in its favor, there is no ground for barring it from presenting additional evidence at trial. Therefore it would be equally precipiate for us to direct the entry of judgment in the plaintiffs' favor—something that the plaintiffs in the

conclusion of their brief do not ask us to do, even though Rule 28(a)(5) of the Federal Rules of Appellate Procedure requires the appellant to place at the end of his brief "a short conclusion stating the precise relief sought." They do argue earlier in the brief that Johnson Controls' fetal protection policy is invalid, and if accepted this argument would obviate the need for a trial. But it is premature to accept it, as the plaintiffs themselves may have realized in formulating their request for relief. We should be as hesitant to endanger the health of children by condemning all fetal protection policies as we should be hesitant to endanger the jobs of women by placing our imprimatur on such policies. We should vacate the district court's judgment and remand for further proceedings to enable the compilation of an adequate evidentiary record.

EASTERBROOK, *Circuit Judge*, with whom FLAUM, *Circuit Judge*, joins, dissenting. Whether the employers should restrain adults from engaging in acts hazardous to their children is an ethical, medical, economic, and political problem of great complexity. But this is a statutory case, and we must implement the law rather than give our own answer. Jonhson's policy is sex discrimination, forbidden unless sex is a "bona fide occcupational qualification"—which it is not.

I

Title VII of the Civil Rights Act of 1964 forbids employers "to discriminate against any individual . . . because of such individual's . . . sex", 42 U.S.C. § 2000e-2(a)(1), unless sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise", 42 U.S.C. § 2000e-2(e)(1). Both the district court and the majority believe that the fetal protection policy may be lawful despite the absence of a BFOQ.

A

Johnson uses sex as a ground of decision. The fetal protection policy applies to all women and no men. It is not written without reference to gender, having an unwelcome side effect. Cf. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Differences between the sexes are its stated rationale. Only women tranmsit lead to children during pregnancy. Because a few women become pregnant with elevated levels of lead in the blood (in four years, eight out of an unknown number), Johnson excludes all women from the danger zone. This treats an employee not as an individual but as a woman. A plan using sex as a criterion and justified by arguments referring to sex is "discriminat[ion] . . . because of . . . sex". *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978).

General Electric Co. v. Gilbert, 429 U.S. 125 (1976), held that a rule distinguishing on account of pregnancy is not sex discrimination, because women are in both the "pregnant" and "non-pregnant" groups. See also *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Court saw the line as one between pregnant employees and all others, a line based on something other than sex (or at least something in addition to sex). Johnson's line based on *ability* to become pregnant, however, is assuredly based on sex. That would be ground for distinguishing *Gilbert*, but Congress interred *Gilbert* in 1978 by enacting the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (the PDA), which provides:

> The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . .

This amendment to Title VII makes distinctions based on women's ability to bear children sex discrimination. It also has a built-in BFOQ standard: unless pregnant employees differ from others "in their ability or inability to work", they must be treated "the same" as other employees "for all employment-related purposes". Although located in a definitional provision, the language after the semicolon is substantive and governs Johnson's plan.

Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), the only other appellate decision that has dealt with a fetal protection policy similar to Johnson's, took a different view.[1] *Wright* observed that a policy using sex as a ground of decision may cause women no more injury than a policy neutral with regard to sex, yet having a disparate impact. A policy designed to promote the health of offspring of both sexes is neutral in objective. A sex-neutral policy is judged under an approach more lenient than the BFOQ standard. Believing that a fetal protection policy rests on strong justifications, *Wright* treated the policy as sex-neutral so that it could sustain a rule functionally identical to Johnson's. 697 F.2d at 1184-92.

This makes things turn not on whether the employer uses sex as a ground of decision but on whether the employer uses sex to serve a "good" policy. If the policy is beneficient and the injury to women "tolerable" in light of the interests served, the court changes the standard of inquiry. Yet whether a policy is "good" is a statutory question, governed by the BFOQ test stated in § 2000e-2(e)(1) and the supplemental rule of the PDA that

[1] Two other cases often are treated as bearing on the validity of such policies: *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984); *Zuniga v. Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982). Both involved x-ray technicians fired immediately after their employers discovered that they had become pregnant, and not policies that disqualified women generally. I therefore put *Hayes* and *Zuniga* to one side for the time being, although they return in Part II.

women and men who are "similar in their ability or inability to work" must be treated the same. A court's belief that a good end is in view does not justify departure from the statutory framework; it is an occasion for applying the statutory framework. *Wright* ignored the PDA and inverted ordinary rules of statutory interpretation when stating (with echoes in the majority's opinion today): "The inappropriateness of applying the overt discrimination/b.f.o.q. theory of claim and defense . . . is that, properly applied, it would prevent the employer from asserting a justification defense which under developed Title VII [disparate impact] doctrine it is entitled to present." 697 F.2d at 1182 n.21. In other words, this *must* be a disparate impact case because an employer couldn't win it as a disparate treatment case. If the rigors of the BFOQ suggest the need for a fresh approach, that is a job for another branch. See *TVA v. Hill*, 437 U.S. 153 (1978). Cf. *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-23 (1989) (the standard for reviewing decisions based on race does not depend on the strength of the justification or on who gains from its use).

In principle a court could make the legal standard turn on what the authors of a rule are trying to accomplish, rather than on the criteria they use to get there. Whether to do so was the nub of the debate in *Manhart*. Los Angeles adopted a pension plan that collected more per month from women during employment and paid retired women the same per month as men. The city defended the policy by observing that the sums collected matched the actuarial value of the payments over the retired employees' lives, because the average woman lives longer than the average man and so receives more monthly checks. Was it sex discrimination prohibited by Title VII? The women said yes, on the ground that every woman paid more per month than every man. The difference was based on sex and justified by an effect (lon-

gevity) linked with sex. The employer said no, on the ground that the pension was worth the contributions *ex ante* to men and women equally, and the groups therefore were treated equally. Only by using sex as a ground of decision, the employer pointed out, could it achieve acturial equality. The Court held that the policy was sex discrimination, because the city used sex as the basis of decision. That this criterion produced equal outcomes for groups was irrelevant in the Court's view, because Title VII requires employees to be treated *as individuals*. To say that sex had been considered in order to achieve equal group averages, the Court believed, was to confess a violation of the law. See also *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983).

Manhart establishes two propositions that together are fatal to Johnson's position. First, Title VII requires equal treatment of employees as persons rather than equal treatment of groups defined by sex (or race, or any other criterion listed in the statute). Observing that the average member of one group does as well as the average member of another does not support the use of any given ground of decision; indeed, resorting to notions of group equality begs the question how a statute presumptively forbidding the use of these criteria could permit them to be used to justify conduct. Second, that equal treatment of employees as persons will lead to higher costs of employing persons of a given sex is no defense. An obligation to pay men and women equal amounts per month after retirement and deduct from pay the same amount per month during employment means that the employer must contribute greater sums per month during women's working years. That incremental cost of female employees is, as the Court construed the statute, no reason to treat women differently. Again this is part of the idea of an anti-discrimination law. Women may have higher pension costs, or higher medical insurance costs (because of pregnancy), or take more days off because of sickness,

or have shorter careers (again because of children). Title VII excludes these as reasons for preferring men, e.g., *Orzel v. City of Wauwatosa*, 697 F.2d 743, 755 (7th Cir. 1983). The PDA, requiring equal treatment of employees "similar in their ability or inability to work" reinforces this conclusion.

Manhart's approach is the norm in anti-discrimination law. Consider, for example, the Supreme Court's first important sex discrimination case under Title VII, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). The employer refused to hire women with preschool-age children. Such a rule might have had benefits for the children, neutral with respect to sex, but the policy was not neutral. The Court brusquely held that the policy is disparate treatment, unlawful unless supported by a BFOQ. Next consider the "bottom line" defense rejected in *Connecticut v. Teal*, 457 U.S. 440 (1982). The employer contended that so long as it hired persons in a mixture reflecting the applicants or population (the "bottom line"), it did not matter that steps along the way appeared to filter out members of one or another group. The Court disagreed, because an argument based on the bottom line treats persons as members of a group defined by sex (race, etc.) and proceeds as if the groups (rather than the applicants and employees) held the right to equal treatment. Title VII, as the Court saw it, requires the employer to treat the applicant as a person without regard to race, sex, etc., on every occasion. These cases, and others like them, dispatch arguments of the sort that because the employer pursues an end, children's welfare, defined without regard to sex, a rule of decision that uses sex as a criterion should be treated as if sex-neutral. Cf. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (same approach in constitutional law).

When the employer engages in sex, race, or age discrimination in an effort to protect customers or members of the public, courts regularly see this as disparate treat-

ment, for which a BFOQ is essential. See *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422-23 (1985); *Hahn v. City of Buffalo*, 770 F.2d 12 (2d Cir. 1985); *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984). There is no reason why things should be different when fetuses, rather than adult bystanders, are the subject of the employer's protection.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978), says that the details of the "prima facie case" of discrimination, and the order of proof and rebuttal at trial, are flexible and should be adjusted to the circumstances. See also *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). Our case does not concern the order of proof and methods of inference; Johnson expressly uses sex to make decisions. When Wisconsin excluded male guards from a women's prison, we saw this as disparate treatment and searched for a BFOQ. *Torres v. Wisconsin Department of Health and Social Services*, 859 F.2d 1523, 1526-28 (7th Cir. 1988) (en banc). Here, too, there is disparate treatment. Fetal protection policies therefore may be justified, if at all, as BFOQs.

A word about the enforcement policy of the Equal Employment Opportunity Commission. The Commission told its staff to use *Wright* and the elaboration of its approach in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), when investigating fetal protection policies. Ordinarily the EEOC's views about the meaning of Title VII are entitled to deference. This policy, however, does not so much interpret Title VII as adopt guidelines for prosecution. Prosecutorial guidelines reflect limitations on the agency's resources and existing judicial interpretations; they do not define the meaning of the law. The Commission told its staff to follow the courts.[2] The guidelines do not discuss the PDA or *Man-*

[2] The policy statement, Notice No. n915.034 (Oct. 7, 1988), says at p. 1 n.1: "three courts of appeals have considered cases in-

hart and give no reason for adopting the *Wright-Hayes* approach as opposed to the BFOQ standard. This may be sound from a prosecutorial perspective but does not address the question in our case. If the EEOC's statement is designed as an interpretive rule, it is neither reasoned nor consistent with Title VII. See *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854, 2863 (1989).

B

The statute allows an employer to show that consideration of sex is "reasonably necessary to the normal operation of that particular business". *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977); *Criswell*, 472 U.S. at 422-23; *Torres*, 859 F.2d at 1527. The plaintiffs argue that "the sex based practice involved here should . . . be held invalid" (Br. 44) because the reasons Johnson offers cannot establish a BFOQ even if factually supported. The Fourth Circuit (unlike the majority of this court) believes that as a matter of law a fetal protection policy does not satisfy the standards for a BFOQ, see *Wright*, 697 F.2d at 1185 n.21, and I think it has this much correct for two reasons: Johnson's stated objectives are insufficient, and even if sufficient do not apply to all women.

Johnson defends its fetal protection policy on the basis of concern for the welfare of the next generation, an objective unrelated to its ability to make batteries (§ 2000e-2(e)(1) speaks of the "operation of the business") or to any woman's "ability or inability to work" (the standard of the PDA). Johnson allowed women to work until 1982, without ill effects on its business; for all we know (the record is silent), other firms in the same business employ

volving fetal hazards . . . , thereby helping the development of an analytical framework for deciding such cases. This policy statement is an elaboration of that framework . . . ." See also p. 4: "the Commission follows the lead of every court of appeals to have addressed the question".

women in the kinds of jobs from which Johnson excludes them. The majority does not mention the PDA, which, added to BFOQ rule, puts out of bounds the justifications Johnson offers.

At oral argument before the panel counsel offered a new defense of Johnson's policy: that it is morally required to protect children from their parents' mistakes. This justification is redolent of *Muller v. Oregon*, 208 U.S. 412 (1908), which sustained a statute curtailing women's hours of work on the ground that maternal functions unsuited women for long hours. The Court wrote:

> [B]y abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. . . . [H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers . . . are not imposed solely for her benefit, but also largely for the benefit of all.

208 U.S. at 421-22. The "abundant testimony of the medical fraternity" turned out to be the triumph of imagination over data. Dangers decried in *Muller* are today perceived as chimerical, excuses for blockading women as effective competitors of men in the labor force. Legislation of the sort allowed by *Muller* "protected" women out of their jobs by making women less attractive as employees. An employer that needed flexibility in assigning hours of work had to hire men; women were consigned to jobs with regular hours but lower wages. See Elisabeth M. Landes, *The Effect of State Maximum Laws on*

the Employment of Women in 1920, 88 J. Pol. Econ. 476 (1980) (finding that "protective" legislation reduced women's hours, hourly wages, and annual income). Such laws also treat women in a stereotypical way. State laws requiring or allowing employers to treat women differently, on the assumption that women are less able than men to take the precautions essential for healthy children, are preempted by Title VII—not because of an express preemption clause, but because no state law may require or excuse a violation of federal law. *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-27 (9th Cir. 1971). Stautes of the sort sustained in *Muller*, supported by the justifications advanced in *Muller*, are museum pieces, reminders of wrong turns in the law. It is not enough to say that Johnson is a private employer while *Muller* dealt with state laws. Title VII is addressed to private employers. The question is whether a justification of a particular kind is an acceptable defense of sex discrimination. This justification is not. No legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation, that the interests of the next generation always trump the interests of living woman, and that the only acceptable level risk is zero. "[T]he purpose of Title VII is to allow the individual woman to make that choice for herself." *Dothard*, 433 U.S. at 335.

Although some women may become pregnant, and a subset of their children might suffer, Johnson cannot exclude all fertile women from its labor force on their account. Most women in an industrial labor force do not become pregnant;[3] most of these will have blood lead

[3] Although some 9% of all fertile women become pregnant each year, the birth rate for blue collar women over 30 is about 2%, and of working women 45-49 only 1 in 5,000 becomes pregnant in a given year. The data are collected in Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1233 (1986). The record does not reveal the birth rate

levels under 30 μg/dl (only about ⅓ of the employees exposed to lead at Johnson's plants have higher levels); most of those who become pregnant with levels exceeding 30 μg/dl will bear normal children (Johnson reports no birth defects or other abnormalities in the eight pregnancies among its employees).[4] Concerns about a tiny minority of women cannot set the standard by which all are judged. An employer establishes a BFOQ only if there is "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), quoted with approval in *Dothard*, 433 U.S. at 333, and adopted as the law of this circuit in *Torres*, 859 F.2d at 1527, 1530. Fear of prenatal injury (which has not happened in the history of the employer) is a far cry from something that prevents "all or substantially all" women from doing their jobs.

To meet the "all or almost all" requirement, Johnson relies on an elaboration of the BFOQ for age discrimination offered in customer-safety cases: if all persons over a certain age are unsafe pilots (drivers, police officers, etc.), *or* if it is impossible to tell which of the older employees is unsafe, then age may be a BFOQ for employment. E.g., *EEOC v. Mississippi State Tax Commission*, 873 F.2d 97, 98 (5th Cir. 1989) (en banc). The genesis of the "impossible to tell" branch of the BFOQ in age

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for Johnson's female laborers, but it must be lower given Johnson's strenuous efforts to discourage pregnancy among those exposed to lead.

[4] One of the children has an elevated level of lead in the blood, but this has not produced an identifiable problem. It is hard, however, to link outcomes such as learning disabilities to lead, since learning disabilities could have many other causes, and it is therefore hard to show in an individual case (as opposed to statistically) that lead injured the child.

cases is that an unsafe employee can't do the job the employer demands. It is word play to say that "the job" at Johnson is to make batteries without risk to fetuses in the same way "the job" at Western Air Lines is to fly planes without crashing. When an employer genuinely can't tell which employees are unfit, *and* when unfitness *for work* is a serious problem, it may use a proxy that otherwise would be off limits. Johnson is not using sex to avert harm to customers. To repeat the statutory language: sex is a BFOQ when its use is "reasonably necessary to the normal operation of [the employer's] particular business" (the BFOQ rule) and employers must treat men and pregnant women equally with respect to their "ability or inability to work" (the PDA). Risk to fetuses falls outside these rules.

Johnson might be concerned about cost. It could have argued that the only alternative to the fetal protection policy is a much clearer workplace, so that no employee's blood lead level exceeds 30 μg/dl, which would be prohibitively expensive and lead it to close the business. Johnson does not make that argument, so the majority properly does not decide whether it would be a BFOQ. Another potential cost comes from tort law. Perhaps Johnson anticipated litigation filed by children injured by lead. The firm does not make this argument either, and so far as I know no child has recovered a judgment on account of parents' occupational exposure to lead. *Security National Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D. Kan. 1985), the only reported case, ended in a jury verdict for the employer even though the child argued that the employer violated OSHA's maximum exposure rules. (Johnson says that it complies with OSHA's rules.) Anyway, the prospect of tort judgments means only that female employees' average cost to Johnson exceeds that of male employees. Title VII requires employers to deal with individual employees rather than with group averages. No firm could exclude women from its work force by saying that higher costs of pensions and health

care made them too costly.[5] If those costs do not establish a BFOQ, could not establish it even in principle, how may the prospect of tort judgments do so? Title VII applies even when—*especially* when—discrimination is rational as the employer sees things.

All of this is not to say where wisdom lies. An employer is better situated than its workers to gather and interpret scientific data, for medical studies are hard to evaluate, and the need to earn a living may induce employees to give too little weight to the interests of their offspring. A recent poll showing that more than 20% of American adults do not know that the Earth orbits the Sun does not lend confidence in the ability of the populace to make decisions that depend on scientific or medical data.[6] If any given employer errs, the forces of com-

[5] Health care expenses for women are substantially higher than those for men even before taking into account the costs of pregnancy. Department of Health and Human Services, *A Summary of Expenditures and Sources of Payment for Personal Health Services From the National Medical Care Expenditure Survey, Data Preview 24* at 11 (May 1987). The PDA requires employers to pick up these higher medical costs, plus the medical costs of pregnancy, if they offer health care to male employees. And after *Manhart* employers that offer pensions must contribute more per month per female employee than per male employee.

[6] The survey concluded that 93-95% of the adult population is scientifically illiterate. "Asked whether the Earth goes around the Sun or the Sun around the Earth, 21 percent replied incorrectly; 7 percent said they did not know. . . . On other questions, the survey found that 43 percent said correctly that electrons, which are components of atoms, are smaller than atoms; 20 percent said they were larger and 37 percent said they did not know which was larger. . . . Of those surveyed, 76 percent answered correctly that light travels faster than sound; 19 percent mistakenly said that sound moves faster." *New York Times*, Oct. 25, 1988, § C p. 10 col. 4. The state of knowledge may be even worse in the United Kingdom: "Only 34% of Britons know that the earth goes around the sun (rather than vice versa) and that it takes a year to do so. Almost one-fifth are presumably busy nailing their furniture to the floor as they imagine themselves hurtling around the sun

petition open opportunities elsewhere. No one can treat lightly the possibility of injury to future children, who cannot protect themselves or participate in the decisions that will govern their lives. Trying to find the "right" accommodation would rob many a person of sleep—for rigorous implementation of fetal protection policies could close more than 20 million jobs to women,[7] while failure to do anything causes injury to unknown numbers. Under the PDA neither the employer nor the court is authorized to essay an answer to this social puzzle. The disparate treatment—BFOQ approach governs, and it resolves today's dispute. Title VII gives parents the power to make occupational decisions affecting their families. A legislative forum is available to those who believe that such decisions should be made elsewhere.[8]

once a day. And they are confused about what the universe is: given a list comprising solar system, galaxy, earth, universe, and sun, only 53% thought that the universe was the largest item. Some 7% thought that the earth was. Asked if nuclear-power stations cause acid rain, almost half the respondents said yes, and only 34% knew that they did not. . . . So much for environmental awareness. . . . Some people seem unworried by radiation: 13% think that radioactive milk can be made safe by boiling it." *The Economist*, July 15, 1989, p. 84 col. 2.

[7] Fifteen to twenty million jobs is the estimate of the Bureau of National Affairs in *Pregnancy and Employment* 57 (1987), limited to injury caused by chemicals. Cases such as *Hayes* and *Zuniga* show that many additional women are affected by restrictions placed on other jobs, such as the x-ray technician jobs that exposed embryos to radiation. Concern about emissions from computers and their terminals has led to proposals that could restrict access even to traditional office jobs.

[8] The EPA, which administers the Toxic Substances Control Act, 15 U.S.C. §§ 2601-54, also may have authority over the subject. See Note, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 Yale L.J. 577, 592-98 (1986).

II

Having adopted the *Wright-Hayes* approach, we still should not affirm the district court's judgment. *Hayes* opined that a fetal protection policy applicable only to women violates Title VII

> unless the employer shows (1) that a substantial risk of harm exists and (2) that the risk is borne only by members of one sex; and (3) the employee fails to show that there are acceptable alternative policies that would have a lesser impact on the affected sex.

726 F.2d at 1554. At the time *Wright* and *Hayes* were decided, and when the EEOC issued its policy statement, courts believed that "business necessity" in a disparate impact case is a *defense*. "Business necessity" and "BFOQ" were not so distinct. We know from *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), however, that the plaintiff bears the burden of persuasion on all questions in every disparate impact case, as the majority today emphasizes. So the *Wright-Hayes* standard has been watered down. The court's "adoption" of *Wright*, *Hayes*, and the EEOC's policy statement is thus in practice more favorable to employers than the Fourth and Eleventh Circuits (and the EEOC) anticipated their approach would be. The plaintiff won in *Hayes*; she would lose under the majority's approach.

Even on the majority's un-demanding standard, however, there are material disputes. The EEOC's policy statement properly criticized the district court for granting summary judgment despite evidentiary disputes material to the application of the *Wright-Hayes* standard. *Notice* n915.034 at 9 n.22.

Substantial Risk. Is there a substantial risk of harm to the offspring of female employees? That lead in the blood is dangerous no one doubts, although experts dispute how much is too much and whether lead is more

risky to the fetus and developing infants than to adults.[9] The extent to which lead in a mother's blood, *at levels to which Johnson exposes its employees*, endangers the fetus is a subject on which there is additional dispute. Showing great injury at 100 μg/dl is one thing; showing risks when no one has levels over 50 μg/dl (and, per OSHA's rules, anyone wanting to get below 30 μg/dl is entitled to a respirator) is another. The record does not quantify the risks at the levels OSHA permits. It also does not reveal the extent to which lead crosses the placenta. Johnson's chief medical consultant, Dr. Fishburn, believes that risk is greatest in the first weeks of pregnancy, before women can withdraw to lead-free environments. Experts take the contrary view that lead does not cross the placenta until late in pregnancy,[10] and that because lead levels in the blood fall substantially within 12 weeks of the last exposure,[11] the danger is reduced if

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[9] For a review of the evidence see William L. Marcus & C. Richard Cothern, *The Characteristics of an Adverse Effect: Using the Example of Developing a Standard for Lead*, 16(4) Drug Metabolism Reviews 423 (1985-86). Dr. Michael Silverstein, a board certified specialist in occupational medicine, testified in a deposition that the risks of a given level of lead in the blood are no greater to the fetus and children than to adults. He supported this position with an affidavit to which he attached three scientific studies. Dr. Marvin S. Legator, Director of the Division of Environmental Toxicology at the University of Texas, gave a deposition agreeing with this view, as did Dr. Ellen Silbergeld, a Senior Scientist in the Toxic Program of the Environmental Defense Fund.

[10] Dr. J. Julian Chisolm, Director of the Lead Program at the John F. Kennedy Institute in Baltimore, one of Johnson's witnesses, testified in a deposition that lead does not cross the placenta until late in the pregnancy and that the adverse effect of lead in a mother's blood does not begin until the last half of the third trimester. Dr. Silbergeld took a similar view.

[11] According to National Research Council Committee on Lead in the Human Environment 59-60 (1980), almost all lead stored in the body outside of bones is eliminated within four to six weeks

women are removed from contact with lead promptly on becoming pregnant.

It is painful to see conflicts of this kind settled by litigation; judges cannot unravel medical mysteries by observing scientists' demeanor on the stand. This is not how scientists resolve disputes among themselves. Demeanor tells the judge only whether the scientist *believes* what he says, something almost irrelevant to a scientific dispute. Scientists formulate hypotheses, collect data, and apply statistical methods to assess them; judges and jurors find this process alien. Yet so long as the substantive rule of law requires a court to resolve scientific disagreements—which the *Wright-Hayes* standard does, though the BFOQ standard avoids the problem—the judge must follow the rules, which means that material disputes must be resolved at trial.

A small risk, even if compellingly documented, is not enough to exclude women from employment. How great is too great? Most women do not become pregnant in any given year, and most female employees do not have blood lead levels exceeding 30 μg dl, so average risk to the employee population may be small. If a woman becomes pregnant with a blood lead level of 40 μg dl, is the risk one learning disability in two pregnancies? One in two thousand? One in two million? These figures imply

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of exposure. Dr. Silbergeld used the higher figure of 100 days for the elimination of lead from blood and soft tissues. Lead is released from bones much more slowly, but lead-207, the most common form they contain, is less active biologically. National Research Council on Biologic Effects of Atmospheric Pollutants 68 (1972). Even persons who have no occupational exposure ingest or inhale lead from other sources (paint, leaded gasoline, etc.), so that the actual blood lead level may drop slowly, but these sources of lead threaten offspring whether or not the mother works in Johnson's plants. It is possible that lead builds up in the placenta during early pregnancy, while the mother's blood lead level is highest, but the extent of this effect is unknown. The net effects of these offsetting processes are not quantified in this record.

different policies, yet we do not know which is correct. How risky is a blood lead level exceeding 30 μg dl compared with other hazards? Most comparisons show that smoking and drinking are quite dangerous to fetuses, more so than many contaminants found in the workplace.[12] Some 2,500 children under the age of one die every year because of their parents' smoking; others never make it to birth.[13] The hazards created by occupational chemicals span many orders of magnitude: some are safer than the sweeteners we wolf down, some are dangerous indeed.[14] Where does lead fit on that spectrum?

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[12] E.g., Surgeon General, *The Health Consequences of Smoking for Women* 191-239 (1980) (carbon monoxide, nicotine, and hydrogen cyanide from smoking cross the placenta, leading to miscarriages, reduction in fetal weight, reduced cognitive development, and Sudden Infant Death Syndrome); Alcohol, Drug Abuse, and Mental Health Administration, *Fetal Alcohol Syndrome and Other Effects of Alcohol on Pregnancy Outcome* (Sixth Special Report to the U.S. Congress on Alcohol and Health) (1987) (maternal drinking is associated with miscarriage, mental retardation of the child, low birth weight, and a characteristic set of birth defects known as "fetal alcohol syndrome"; collecting sources); Ernest L. Abel, *Fetal Alcohol Syndrome and Fetal Alcohol Effects* (1984) (collecting data on the effect of maternal drinking on the fetus); Richard B. Everson et al., *Quantitative Associations Between DNA Damage in Human Placenta and Maternal Smoking and Birth Weight*, 80 J. Nat. Cancer Inst. 567 (1988) (maternal smoking damages DNA of fetus); Steven H. Fox et al., *Perceptions of Risks of Smoking and Heavy Drinking during Pregnancy: 1985 NHIS Findings*, 102 Public Health Reports 73 (1987). Miscarriages, low birth weight, and retarded cognitive development, common consequences of maternal smoking and drinking, resemble the consequences of maternal lead but appear to be more common.

[13] Centers for Disease Control, *Smoking-Attributable Mortality and Years of Potential Life Lost—United States, 1984*, 36 Morbidity and Mortality Weekly Report 694 (Oct. 30, 1987).

[14] See Edmund A.C. Crouch & Richard Wilson, *Risk/Benefit Analysis* 173-83 (1982); Bruce N. Ames, Renae Magaw & Lois Swirsky Gold, *Ranking Possible Carcinogenic Hazards*, 236 Science 271 (1987); John Tierney, *Not To Worry*, Hippocrates 29 (Jan/

I cannot believe that Johnson would be entitled to fire female employees who smoke or drink during pregnancy —let alone to fire all female employees because some might smoke or drink—which makes it hard to exclude women to curtail risk from other substances.

How does the risk attributable to lead compare, say, to the risk to the next generation created by driving a taxi? A female bus or taxi driver is exposed to noxious fumes and the risk of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women? That an employer could forbid pregnant employees to drive cars, because of the risk accidents pose to fetuses? For all we can tell, accepting Johnson's argument compels us to answer "yes" to these questions, which simply points up the need to quantify the hazard. It also points up the political nature of the dispute. How much risk is too much is a moral or economic or political question, one ill suited to the processes of litigation and not the sort of question Title VII puts to a judge.[15]

Feb. 1988); John F. Morrall III, *A Review of the Record*, Regulation 25 (Nov/Dec 1986).

[15] There is a tradition in public health of resolving doubts by assuming that risks exist until they can be disproved. As the uncertainties are substantial, this process often produces measures of risk that appear to be substantial. Yet whether to assume that the maximum likely hazard will come to pass—a process known as "conservative risk assessment"—is itself a political question. A court would be obliged to try to produce the most accurate, rather than the most conservative, assessment, for resolving doubts in one direction only produces inaccurate comparisons of poorly-understood risks (which will be overstated) against well-understood risks (which would be accurately stated). See Albert L. Nichols & Richard J. Zeckhauser, *The Perils of Prudence: How Conservative Risk Assessments Distort Regulation*, Regulation 13 (Nov/Dec 1986). Yet in an effort to measure risk accurately a court would get little aid from existing studies, often tailored to fulfilling regulatory demands for a "conservative" bias.

The most concerted effort to estimate the risks lead poses to offspring was conducted by OSHA in the course of promulgating its lead rules. OSHA considered and rejected a proposal to exclude women capable of bearing children from jobs in which blood lead levels may exceed 30 μg/100 g. It stated:

> Industry testimony further suggests that women of childbearing potential could be "protected" by excluding them from employment in many parts of the lead industry. . . . The record in this rulemaking is clear that male workers may be adversely effected [sic] by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. Given the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy. Effective compliance with all aspects of these standards will minimize risk to all persons and should therefore insure equal employment for both men and women.

43 Fed. Reg. 52953, 52966 (1978). OSHA's regulations require employers to make respirators available, so that both men and women desiring children can reduce their blood lead levels. 29 C.F.R. § 1910.1025(f)(1)(iii). They also require employers to conduct annual educational programs "with particular attention to the adverse reproductive effects on both males and females", § 1910.1025 (*l*)(1)(v)(D). In order to say that the risk to offspring at firms complying with OSHA's rules (as Johnson says it does) is so "substantial" that a woman should not be allowed to work at any job where there is the slightest chance of a blood lead level exceeding 30 μg/dl, a court must agree with the judgment of OSHA that the 50 μg/100 g limit, plus the availability of respirators to

employees seeking to attain a level of 30 μg/100 g, is enough. My colleagues essentially take judicial notice that OSHA is wrong, slip op. 52-53, an extraordinary step. The record does not contain evidence sufficient to contradict OSHA's conclusion, let alone evidence so lopsided that summary judgment is appropriate.

One more observation. "Substantial risk" must mean substantial *net* risk. Excluding women from industrial jobs at Johnson may reduce risk attributable to lead at the cost of increasing other hazards. There is a strong correlation between the health of the infant and prenatal medical care; there is also a powerful link between the parents' income and infants' health, for higher income means better nutrition, among other things. See Aaron Wildavsky, *Searching for Safety* 59-72 1988); Victor R. Fuchs, *How We Live* 31-40 (1983). Removing women from well-paying jobs (and the attendant health insurance), or denying women access to these jobs, may reduce the risk from lead while also reducing levels of medical care and the quality of nutrition. The net effect of lower income and less medical care could be a reduction in infants' prospects.[16] Mary E. Becker, *From* Muller v. Oregon to *Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1229-31 (1986).

Nothing in the record shows the net risks. When asked at oral argument whether Johnson attempted to determine net effects before adopting its policy, counsel said no. He continued, in effect: "If there is a greater risk, that's not our concern." A "not on *our* watch" position

[16] The majority says that "[t]his issue bears no relevance to Johnson Controls' employment practices", slip op. 32 n.28, because Johnson protected the salary and benefits of women transferred out of jobs in 1982. But Johnson does not offer women *excluded* from these jobs in 1983 or later the salary and benefits they could have earned in them, and it also does not protect the income and benefits of employees who because of the policy cannot exercise their seniority (bumping) rights to avoid layoffs.

is the bureaucrat's shelter and not becoming if, as Johnson so earnestly maintains, it is concerned about the welfare of unborn children. These helpless beings do not know or care about the source of risk; they would care only about its aggregate level. Surely Title VII does not allow an employer to adopt a policy that simultaneously makes both women and their children worse off.

Mediation through a Single Sex. Is the risk to the child transmitted by one sex only? If "the risk" is defined as risk caused by lead entering the fetus's blood via the placenta, it is by definition confined to one sex. But if we ask instead "Does the presence of lead in a parent's blood pose a risk to the fetus?", then the evidence conflicts. The broader perspective is the correct one when aggregate levels of risk are the proper concern.

Three affidavits in the record, and papers in medical journals, maintain that lead in the blood creates risks for offspring of both male and female employees. The American Public Health Association and other medical groups have filed a brief as *amici curiae* marshaling an impressive array of studies linking lead with injury to the male reproductive system, and thence to offspring. E.g., Christopher Winder, *Reproductive Effects of Occupational Exposures to Lead: Policy Considerations*, 8 NeuroToxology 411 (1987); Herbert L. Needleman & David Bellinger, *Commentary*, Environmental Research (1988). Most of the data come from animal studies, but some human studies suggest that the effects occur in our species too. OSHA concluded that lead in men as well as women is hazardous to the unborn. The medical surveillance guidelines published as an appendix to the agency's lead control regulations state:

> Exposure to lead can have serious effects on reproductive function in both males and females. In male workers exposed to lead there can be a decrease in sexual drive, impotence, decreased ability to pro-

> duce healthy sperm, and sterility. Malformed sperm (teratospermia), decreased number of sperm (hypospermia), and sperm with decreased motility (asthenospermia) can all occur. Teratospermia has been noted at mean blood levels of 53 μg/100 g and hypospermia and asthenospermia at 41 μg/100 g. Furthermore, there appears to be a dose-response relationship for teratospermia in lead exposed workers. . . . [B]ecause of the demonstrated adverse effects of lead on reproductive function in both the male and female as well as the risk of genetic damage of lead on both the ovum and sperm, OSHA recommends a 30 μg 100 g maximum permissible blood lead level in both males and females who wish to bear children.

29 C.F.R. Part 1910, pp. 833-34 (1987). Perhaps OSHA is wrong; its findings do not bind Johnson in this litigation. But its view has been sustained once after rigorous attention. *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1256-58 (D.C. Cir. 1980) (describing as "abundant" the evidence supporting the belief that lead injures the reproductive systems of both sexes and sustaining as rational OSHA's decision that the evidence does not justify excluding women from the workplace). Affidavits and professional articles describing the latest evidence also support OSHA's judgment. The district court could not properly reject it without holding a trial.

Least of all could a court reject it, as my colleagues do, on the ground that as a matter of law animal studies are not "solid scientific data", slip op. 33. The District of Columbia Circuit concluded that "virtually undisputed evidence [shows] that at 30 ug/100 g and above, men suffer . . . interference with their ability to produce normal sperm", 647 F.2d at 1249. The medical profession, like the Food and Drug Administration, will be stunned to discover that animal studies are too "speculative", slip op. 33, to be the basis of conclusions about risks. Often animal studies are the best foundation for decision. The

Supreme Court has concluded that they may be used, e.g., *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 657 n.64 (1980) (plurality opinion). OSHA relied on these very animal studies when establishing its lead rules, as the D.C. Circuit held it may. 647 F.2d at 1257 & n.97. See also, e.g., *Simpson v. Young*, 854 F.2d 1429 (D.C. Cir. 1988); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1489-90, 1492 (D.C. Cir. 1986), sustaining risk assessments based on animal studies. Indeed, on occasion animal studies *compel* responsible agencies to act. *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987).

Less Restrictive Alternatives. An employer cannot close employment opportunities to women in order to protect the next generation if some more modest alternative would do (nearly) as well at protecting the unborn. Johnson's policy has a striking sweep: *no* fertile woman can be hired for a job in which *any* employee has had a blood lead level exceeding 30 μg/dl *anytime* during the last year, or in *any* job that might lead to a promotion to such a job. As a practical matter, this means every industrial job at Johnson's battery plants. The firm advised its hiring offices to tell women that "we have no openings for women capable of bearing children". To state the policy is to reveal many less stringent options that might be almost as good at protecting the interests of children.

Women over 40 rarely have children. Why are they forbidden to work? (One of the plaintiffs, 50 years old and divorced when the suit was filed, had nonetheless been excluded from jobs covered by the policy.) Covering them reduces the lead risk to zero, but "zero" is not the only acceptable level.

Many workers in jobs in which some employee has a level exceeding 30 μg/dl have levels less than that. Only ⅓ of Johnson's industrial employees exceed the 30 μg/dl figure. The levels of lead in the blood depend not only

on lead in the air but also on personal hygiene. Some workers allow particles to remain on their clothes or person, staging points from which they can be swallowed. Why not allow a woman to enter jobs in which significant fractions of workers sustain levels less than 30 μg/dl, to see whether she can too? Why treat all women as unable to follow good industrial hygiene, or as unwilling to use a respirator, just because $\frac{1}{3}$ of the men have elevated levels of lead in the blood? Johnson replies that lead levels usually are greatest shortly after entering a new job, before the employee learns how to reduce the level; the women might become pregnant during these initial weeks or months. True enough, but again this answer assumes that the only acceptable level of risk is zero.

Some workers who start at entry-level jobs with low exposure to lead will be promoted to higher-lead jobs; others will not (or will leave before then). Johnson excludes women even from these safer jobs, although they pose no appreciable risk to offspring. Doubtless Johnson believes that unimpeded lines of progression make its operation more efficient, since it can invest more in training women in skills that are transferrable to new jobs within the firm. Yet this form of savings does not count under Title VII. Let us suppose that Johnson had light-lifting and heavy-lifting jobs, joined in a line of progression. Would the inability of many or even all women to perform the heavy-lifting job permit Johnson to exclude all women from the light-lifting job? The exclusion might be desirable from the perspective of business efficiency, but Title VII would not allow it. So, too, Title VII forbids a firm to exclude all women from a line of progression on the ground that some will drop out to have children, rendering their training worthless to the firm. Women have less attachment to the work force than men, making it privately rational for firms to invest less in training them for high-skill jobs; Title VII just as clearly

forbids firms to do this. What Johnson has done is little different, and at some cost to itself it can change the fetal protection plan to enlarge women's opportunities at no cost whatever in risk to the unborn.

III

The *Wright-Hayes* standard is the wrong one. Johnson needed to, and did not, establish that sex is a BFOQ for employment at its battery plants. Yet even given the majority's decision to adopt the *Wright-Hayes* standard, the plaintiffs are entitled to a trial. Seven judges of this court have analyzed the conflicting medical evidence and reached their own conclusions about its significance, conclusions at variance with those drawn by the American Public Health Association and the Occupational Safety and Health Administration from the same kind of evidence.[17] Judges may be astute students of medical findings, but the presence of thoughtful persons on the other side suggests caution—and at all events appellate judges should not be resolving scientific disputes.

This is the most important sex-discrimination case this circuit has ever decided. It is likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII. If the majority is right, then

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[17] The *amici curiae* whose view of the evidence differs from that of the majority include the American Public Health Association, the American Society of Law and Medicine, the Planned Parenthood Federation of America, several toxicologists and physicians who have published scholarly papers on the subject (some of which Johnson relied on, to the consternation of the authors who appear before us to denounce its interpretation of their research), and Eula Bingham, a professor of environmental health who was also the Assistant Secretary of Labor for OSHA at the time that agency published its lead regulations. Whether we think these persons and groups right or wrong, we should not suspect them of insufficient devotion to the health and welfare of the next generation.

by one estimate 20 million industrial jobs could be closed to women, for many substances in addition to lead pose fetal risks. See note 7 above. Whether that would happen is of course a separate question; legal entitlements need not translate to action. But the law would allow employers to consign more women to "women's work" while reserving better-paying but more hazardous jobs for men. Title VII was designed to eliminate rather than perpetuate such matching of sexes to jobs.

Title VII requires employers to evaluate applicants and employees as individuals rather than as members of a group defined by sex. The statute has its costs, prenatal injuries are among these. Appeals to the "flexibility" with which the Supreme Court has allocated burdens of proof and persuasion get us nowhere. No amount of "flexibility" justifies sex discrimination without a BFOQ, unless by "flexibility" we mean a prerogative to disregard the statute when it requires decisions antithetical to our beliefs. Although my colleagues refer to many constitutional cases, such as *Rostker v. Goldberg*, 453 U.S. 57 (1981), for the proposition that sex discrimination sometimes is permissible, cases showing that Congress *may* authorize sex-based decisions hardly shows that in this instance it *did*. Title VII forbids rather than requires resort to sex as a basis of decision.

Risk to the next generation is incident to all activity, starting with getting out of bed. (Staying in bed all day has its own hazards.) To insist on *zero* risk, which the court says Johnson may do, is to exclude women from the industrial jobs that have been a male preserve. By all means let society bend its energies to improving the prospects of those who come after us. Demanding zero risk produces not progress but paralysis. Defining tolerable risk, and seeking to reduce that limit, is more useful—but it is a job for Congress or OSHA in conjunction with medical and other sciences. Laudable though

its objective be, Johnson may not reach its goal at the expense of women.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 84-C-472

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs,

vs.

JOHNSON CONTROLS, INC.,
Defendant.

DECISION AND ORDER

[Filed Jan. 21, 1988]

This case presents the issue of whether a fetal protection policy which prohibits women who are capable of bearing children from working in jobs where there is a likelihood that their blood lead [1] levels will rise above 30 micrograms violates Title VII of the 1964 Civil Rights Act. Defendant, Johnson Controls, Inc. ("Johnson Controls") has filed a motion for summary judgment. After carefully reviewing all the submissions from both parties and the law on this issue, it is the Court's conclusion that the fetal protection policy at issue does not violate Title VII, and the defendant's motion for summary judgment is hereby GRANTED.

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[1] A word frequently used by the experts is blood lead. Blood lead is a measure of the amount of lead that is present in the circulation where venous blood is drawn.

I. *Background Facts*

Defendant has seventeen plants in its battery division. Fourteen of these plants manufacture batteries. Lead is the principal active material used in batteries. It is the main ingredient in the paste which forms the plates of the batteries, and it forms the structure for all the conductive elements in the battery for transmitting current.

On February 25, 1985, as a result of a stipulation between the parties, the Court certified the following class: all past, present and future production and maintenance employees employed in bargaining units represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and/or one of its Local Unions at Defendant's Battery Division plants located in Garland, Texas; Holland, Ohio; Fullerton, California; Owosso, Michigan; Louisville, Kentucky; Texarkana, Arkansas; Bennington, Vermont; Middleton, Delaware; and Atlanta, Georgia, who have been and continue to be affected by Defendant's Fetal Protection Policy implemented in 1982.

The policy at issue was implemented in 1982 by the defendant. The policy excludes women who are capable of bearing children from working in jobs where their blood lead level will rise above 30 micrograms. Women are presumed capable of bearing children until they medically prove contrary. Women who are required to transfer out of jobs because of the policy are paid medical removal protection benefits to compensate for lost earnings. Women who are not in positions where their blood lead levels will not rise to 30 micrograms are prohibited from transferring into such positions.

The plaintiffs allege that this policy discriminates against both women and men. Based on this policy plaintiffs allege that there is sex discrimination in recruitment and hiring, job assignments, wages, promotions and transfers within the bargaining unit, seniority, overtime,

layoff and recall, demotions, on-the-job training, maternity policies, on-the-job harassment, fringe benefits, and health and safety conditions.

There is no dispute between the parties regarding the fact that excessive exposure to lead can result in significant harm to persons. There is a dispute, however, on the issues of whether there is a significant risk of harm to the fetus from lead exposure and whether that risk is substantially confined to the offspring of females, as opposed to male workers. There is also a dispute as to whether a fetus is more sensitive to lead than a postnatal child. Depositions and affidavits of experts have been submitted by plaintiffs and defendant, and the Court has closely reviewed those documents. Following is a brief summary of the testimony of the experts.

A. *Expert Opinions*

Dr. Anthony R. Scialli is a practicing physician and director of the Reproductive Toxicology Center. The Center serves as a source of information on the potential reproductive toxicity of environmental and physical agents. Dr. Scialli holds the opinion that because a fetus undergoes extremely rapid development of the internal nervous system during gestation, the fetus is even more sensitive to the effects of lead than a young child. Dr. Scialli further stated that damage of the central nervous system includes intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities which may be permanent. According to the affidavit, Dr. Scialli is aware of no studies which show that male blood lead levels of up to 50 micrograms results in any abnormality of offspring, and further that lead does not cause any change in the sperm that would be transmitted to offspring and result in abnormality in the offspring. Finally, the affidavit states that a man with a blood lead level of 50 micrograms would not have an increased risk of fathering a child with abnormalities.

Dr. J. Julian Chisolm who is a pediatrician and director of the Lead Program at the John F. Kennedy Institute set forth the following opinion:

> During pregnancy the lead in the mother's blood transfers across the placenta to the fetal circulation. The concentration of lead in the fetal tissue increases rapidly during the last trimester of pregnancy. At birth, the fetus generally has the same blood lead level as the mother. However, the fetus is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child. This is particulary true during the latter part of the gestation period when the central nervous system of the fetus is developing very rapidly and is extremely susceptible to the toxic effects of lead. Medical studies released in the last year or two out of Boston, Cincinnati and Port Pirie, South Australia suggest that exposure to the fetus of blood lead levels as low as 10 micrograms presents [a] grave risk of permanent harm to the central nervous system of the fetus. The risk of harm to the fetus increases proportionately with the increase of blood lead levels over 10 micrograms. Such harm includes stillbirth, reduced birth weight and gestational age, and retarded cognitive development which may result in learning deficiencies and behavioral disorders.
>
> There is no medical evidence that lead exposure to the adult, male or female, has any adverse effect on the offspring. Rather, the available medical evidence establishes that it is the exposure directly to the fetus, through the pregnant woman, which causes harm to the offspring.

Likewise, the affidavit of Paul B. Hammon, Professor of Environmental Health at the University of Cincinnati and director of a study currently being conducted in Cincinnati of the effects of lead exposure on children, stated

that he was unaware of any human studies which conclude that blood lead levels of up to, and even exceeding, 50 micrograms in the adult male will cause any demonstrable effect on the development of the fetus.

The deposition of Seymore Legator, professor and director of the division of environmental toxicology was submitted wherein Professor Legator states that there is "no question that lead is hazardous to the fetus by embryo exposure" and that children are very sensitive to lead. Professor Legator also stated that lead poses a threat to both men and women, but it is still unknown about male sensitivity, but he recognized that there is a problem and that lead probably causes a genetic lesion during spermatogenesis.

Another physician, M. Donal Whortin, is the Senior Occupational Physician/Epidemologist for a company that conducts research in the areas of occupational and environmental health and is a primary medical consultant for a number of companies. Dr. Whortin holds the opinion that "the current OSHA lead standard of 50 micrograms per deciliter of whole blood should generally protect adults of either sex from significant adverse effects in the various adult systems." Dr. Whortin was a coinvestigator in a 1981 study which compared the quality of the semen of lead exposed workers with non-exposed males. The study discovered no changes in the semen quality of lead exposed workers. Nevertheless, Dr. Whortin stated that recent medical studies have shown that a fetus' central nervous system can be injured by exposure to blood lead levels of 10 micrograms. Dr. Whortin concluded that the central nervous system of the fetus and not the reproduction systems of the male or female worker is at greatest risk.

The testimony of Charles W. Fishburn was also submitted for purposes of the motion. Dr. Fishburn is a physician and Assistant Clinical Professor at the University of Wisconsin. Dr. Fishburn is certified in occupational medicine. Occupational medicine involves the study of the relationships of injury and disease caused by chemical exposures in occupations. He states that children are particularly sensitive to lead because children do not have a barrier between the brain and the blood. Further, children develop a barrier around the age of five. Until the barrier is developed, if children ingest lead, they can be poisoned immediately. The child also can go into convulsions resulting in damage to the central nervous system.

In a fetus, the central nervous system is one of the first systems that develops and the first to be affected. A fetus gets its blood from the mother and there is no way, according to Dr. Fishburn, to protect a fetus when it is overexposed to lead. Dr. Fishburn states that damage to the central nervous system is apparently permanent.

Michael Silverstein, an Occupational-Health Physician in the Health and Safety Department of the United Auto Workers, is of the opinion that there is no evidence that reproductive risks are different for men and women at equal blood-lead levels. Furthermore, Dr. Silverstein states that "the toxic effects of lead exposure on human adults is similar and equivalent in impact to that observed in children at equivalent exposure levels." Dr. Silverstein discussed one study published in 1972, Hilderbrand, where it was found that male rats with blood levels between 14 and 26 resulted in impotence and a decrease in sperm mobility. Dr. Silverstein stated that it could be speculated that an abnormal sperm could carry damaged genetic material which could result in damaged offspring or functional infertility.

Assistant Professor of Occupational Medicine at the University of Michigan School of Public Health, Kelly Ann Brix, states the conclusion, based upon a review article, that there is a clear effect of lead upon the male reproductive tract in mammals.

Ellen Silbergeld, a toxicologist and a senior scientist for the Environmental Defense Fund, holds the opinion that all persons should not be exposed to lead levels above 12 micrograms.[2] Silbergeld also states that there is no evidence that a fetus is more sensitive than a post-natal child. Further, in animals, Silbergeld states, that high doses of lead in the first trimester can cause spontaneous abortion of an embryo. Silbergeld also stated that "a woman may be exposed to lead early in pregnancy and deficits noted in the child after birth, but those deficits might have been associated with the on-going exposure which occurred in the late stages of pregnancy . . . [because] for all purposes there is a continuing exposure to lead even after removal from sources of lead. . . ." Silbergeld estimated that if a person, after exposure to lead, is placed in a lead-free environment, the turnover of lead is about 100 days, "so within a year or so there would be a reduction in lead." This time estimate according to Silbergeld is accurate in a lead-free environment, but in the absence of a lead-free environment, there is a continuing exposure to lead.

II. *Prior Law*

There are essentially two types of Title VII cases: Disparate treatment and disparate impact. Disparate treatment occurs when an employee has been treated less favorably because of sex. There are two types of disparate treatment cases: facial and pretextual. "Facial discrimination occurs when an employer adopts a policy that explicitly treats some employees differently from others on the basis of race, religion, national origin, or gender (pregnancy)." *Haynes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547 (11th Cir.), *reh'g denied*, 732 F.2d 944 (1984). The only defense to a charge of facial dis-

[2] Silbergeld also states that "I think the blood leads that are called for monitoring are much too high, and I also don't understand why it applies only to women."

crimination is a bona fide occupational qualification (BFOQ). A second theory under disparate treatment occurs when the employer adopts a facially neutral policy, but which is a pretext for discrimination. A disparate impact suit exists when although a policy is neutral, it has a disparate impact on a protected class. Discriminatory motive is not required, and the defense to an allegation of disparate impact is business necessity.

Only three jurisdictions have reviewed Title VII actions involving the health of the fetus.[3] The Fourth Circuit Court of Appeals was the first circuit court to address the fetal vulnerability program in *Wright v. Olin Corp.*, 697 F.2d 1172, 1177 (4th Cir. 1982). Olin Corporation instituted a fetal vulnerability policy which restricted fertile females from jobs which required contact with toxic chemicals. The Fourth Circuit determined that the disparate treatment analysis was inappropriate for this particular case because under disparate treatment, the plaintiff must show that the employer intended to treat the class less favorably. The *Wright* court stated:

[3] Despite a lack of case law on this issue, many legal writers have addressed the issue. *See generally*, Comment, *Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection—But Can They Succeed?*, 20 J. Marshall L. Rev. 747 (1987); Comment, *Gender Specific Regulations in the Chemical Workplace*, 27 Santa Clara L. Rev. 353 (1987); Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 Yale L. J. 577 (1986); Timke, *Exploring the Limits of Legal Duty: A Union's Responsibilities with Respect to Fetal Protection Policies*, 23 Harv. J. on Legis. 159 (1986); Comment, *Fetal Protection Programs under Title VII—Rebutting the Procreation Presumption*, 46 U. Pitt. L. Rev. 757 (1985); Note, *Wright v. Olin Corp.: Title VII and the Exclusion of Women from the Fetally Toxic Workplace*, 62 N.C.L. Rev. 1067 (1984); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641 (1981).

> Here the claim is that the intention to "treat less favorably" is manifest in the very nature of the program and the factual defense is not truly aimed at rebutting that indisputable fact but at justifying it on the basis that the purpose behind it was benign in relation to the claimant's sex.

697 F.2d at 1185 n.20. The court stated that the disparate impact theory with the business necessity defense was appropriate. The court held that the fetal protection policy establishes a prima facie case of discrimination. The court went on to find, however, that a business necessity defense existed in this situation by analogizing the fetus to invitees and licensees who are legitimately on the business premises. The court stated that "the safety of unborn children of workers would seem no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon the employer's premises." 697 F.2d at 1189.

The Fifth Circuit was the next circuit to address the issue of fetal protection in *Zuniga v. Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982). In *Zuniga*, a female x-ray technician was terminated from employment because of the effects of exposure of the fetus to x-ray radiation, and the concern of future liability of the hospital to the child. The Fifth Circuit found that the plaintiff rebutted the business necessity defense by showing that the hospital failed to utilize less discriminatory means. *Id.* at 992.

The next circuit to address this issue was the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir.), *reh'g denied*, 732 F.2d 944 (1984). *Hayes* also involved a plaintiff who was a female x-ray technician and who was fired because she was pregnant. The Eleventh Circuit reviewed the case under both the disparate treatment analysis and the disparate impact analysis. Under the disparate treatment analysis, the

court did not find that an analysis of pretextual discrimination was appropriate because the plaintiff was fired because of her pregnancy. A BFOQ defense could not be established because there was no evidence that plaintiff's pregnancy would interfere with her ability to perform her job, and the hospital failed to provide evidence that the level of radiation to which the plaintiff would be exposed posed an unreasonable risk of harm to the fetus.[4]

The Court, however, found that a facial discrimination analysis was proper. A presumption of facial discrimination applies when the policy at issue only applies to women. "That presumption may be rebutted, however, if the employer can show that although its policy applies only to women, the policy is neutral in the sense that it effectively and equally protects the offspring of all employees." *Hayes*, 726 F.2d at 1548.

The *Hayes* court went on to state that even if the employer proves that the policy is justified in a scientific basis and is not required to protect the offspring of male employees, the policy still has a disproportionate impact on women; only women are excluded from the jobs. The *Hayes* court stated that the plaintiff established an automatic case of disparate impact for which the defendant must raise a business necessity defense.

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[4] The *Hayes* court further noted:

> Because the Hospital failed to prove its policy was necessary we need not reach the factual issue of whether x-ray radiation affects the offspring of employees only through pregnant women, or whether similar effects can occur from exposure to males. Documents cited by amici do suggest that radiation induced mutations can pass to offspring from male sperm, but neither party developed on this issue at trial.

Hayes v. Shelby Memorial Hosp. 726 F.2d 1543, 1552 (11th Cir.), *reh'g denied*, 732 F.2d 944 (1984). The parties in this case have, however, submitted affidavits and depositions regarding the effects males exposed to lead and their offspring.

The business necessity defense is generally related to job performance. The *Hayes* court recognized that fetal protection does not have any relation to job performance. The court, however, did not find that the business necessity defense does not apply, but rather found that "the defense in a fetal protection case is justified by a genuine desire to promote the health of employee offspring. . . ." *Id.* at 1552-53 n.15. The court went on to further hold that the business necessity defense "automatically" applies because at the point where the court undertakes a disparate impact analysis, the employer "has *already* proved—to overcome the presumption of facial discrimination—that its policy is justified on a scientific basis and addresses a harm that does not affect men." *Id.* at 1553. If a business necessity defense exists, the burden then shifts to the plaintiff to show that there are no "acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would better accomplish the purposes with a less adverse impact on one sex." *Id.* In brief three elements were set forth by the *Wright* court for reviewing a fetal protection policy:

> (1) that a substantial risk of harm exists;
>
> (2) that the risk is borne only by members of one sex; and
>
> (3) that the employee fails to show that there are acceptable alternative policies that would have a lesser impact on the affected sex.

Id. at 1554. If these three elements are met, the policy does not violate Title VII.

III. *Analysis*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A factual dispute will not preclude summary judgment unless the fact is "outcome determinative according to the governing law." *Reardon v. Wroan*, 811 F.2d 1025, 1027 (7th Cir. 1987).

A. *Disparate Treatment*

Reviewing this case under a disparate treatment analysis results in the conclusion that the plaintiffs have established a prima facie case of discrimination because the fetal protection policy excludes women from positions which men are not excluded from. The *Hayes* court stated that there is a "*presumption* that if the employer's policy by its terms applies only to women, then the policy is facially discriminatory." 726 F.2d at 1548. This presumption is rebutted by demonstrating that there are "significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary for the safety of the unborn children, that fertile women workers be appropriately restricted from exposure to those hazards and that its program is effective for the purpose." *Wright*, 697 F.2d at 1190; *Hayes*, 726 F.2d at 1548.

In the present case, there is a disagreement among the experts regarding the effect of lead on the fetus and the effect of lead on male and female reproduction. This dispute, however, is not outcome determinative. The Fourth Circuit stated:

> To establish the requisite degree and cast of the risk of harm, it is not necessary to prove the exist-

> ence of a general consensus on the points within the qualified scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists, and that it is substantially confined to women workers, that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.

The expert opinion in this case demonstrates that there is a considerable body of opinion which holds that lead is hazardous to the fetus through embryo exposure, and a fetus that is exposed to lead carries the significant risk that the central nervous system will be damaged. Further, a significant opinion exists which holds that the fetus cannot be protected when it is overexposed to lead from the mother's blood. Although plaintiffs state that today "reproduction is now largely discretionary," Dr. Chisolm stated that many pregnancies are unplanned. It is very likely that a woman could be pregnant without being aware of it. If this women had a blood lead level of above 10 micrograms, her child could be born with abnormalities even if, after she discovers that she is pregnant, she removes herself from the lead environment because the fetus has been exposed to lead during early development when the central nervous system was developing. Also, lead remains in the body for a significant period of time. Furthermore, lead builds up in the blood, soft tissues, and bones. If the lead leaves the blood and soft tissues, lead still remains in the bones; it takes even longer for the lead to leave the bones. According to the experts, it takes about two or three times as long for the blood leads to decrease as it did for such blood levels to increase.

Further, a fetus that has been exposed to lead may be stillborn. The fetus may have a reduced birth weight and gestational age, and retarded cognitive development which may result in learning deficiencies and behavioral

disorders. This is a significant and unreasonable risk of harm to the fetus. The fetal protection policy is necessary. The employer has carried its burden of "showing that the body of opinion believing that significant risk exists is so considerable 'that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.'" *Wright*, 697 F.2d at 1191.

The next step to consider is whether the hazard does not apply to the offspring of male employees. In *Hayes*, the court stated, "[i]n those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women." 726 F.2d at 1549.

Expert opinion has been provided which holds that lead also affects the reproductive abilities of men and women. Some experts hold that these effects are as great as the effects of exposure of the fetus. Although the Court believes that men, women, and fetuses should be protected from lead exposure, there is expert opinion that fetuses are subject to a greater risk because the fetuses central nervous system is developing, and further, a fetus could be exposed to lead without the mother's knowledge. One legal writer has stated that "an employer may be justified in excluding all women of childbearing capacity from working with compounds that cause reproductive injury to the female worker prior to her knowledge of pregnancy." Comment, *Gender Specific Regulations in the Chemical Workplace*, 27 Santa Clara L.Rev. 353, 370 (1987). Although adults of both sexes may be subject to equivalent susceptibility of reproduction hazards, a great body of experts are of the opinion that the fetus is more vulnerable to levels of lead that would not affect adults. The Court simply cannot overlook this possibility of severe harm only to the fetus. As

a concern for society and future generations this Court must uphold the fetal protection policy. The fetus deserves special protection from lead. If women always knew when they were going to become pregnant, the mother could remove herself from the lead environment; this predictability does not always occur with accuracy. "Unlike abortion, in which a woman makes a knowing decision to end fetal life, workplace hazards may harm a worker's reproductive system or unborn offspring without his or her knowledge or consent." Timko, *Exploring the Limits of Legal Duty: A Union's Responsibilities With Respect to Fetal Protection Policies*, 23 Harv.J. on Legis. 159, 167 (1986). Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory.[5] Further, plaintiffs have failed to establish that there is an acceptable alternative policy which would protect the fetus. Perhaps with the improved development of pregnancy testing, an alternative may develop, but even if a pregnant woman is removed from lead exposure once she is aware of the pregnancy, the lead level does not decrease as quickly as it built up; lead remains in the body for some time. Thus, the fetus would be exposed to lead even if the mother is removed from the lead environment.

Additionally, based upon the affidavits submitted, it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels. Since 1978,

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[5] Because this Court has determined that the lead fetal protection policy is not facially discriminatory, this Court does not have to undertake a bona fide occupational qualification's (BFOQ) analysis. "Under traditional analysis, the BFOQ defense is available only when the employer can show that the excluded class is unable to perform the duties that constitute the essence of the job, duties that Title VII defines as 'necessary to the normal operation of the particular business or enterprise.'" *Hayes*, 726 F.2d at 1549. Although not required to address, this Court merely notes that an employee's job performance would not be affected by pregnancy.

the defendant has spent approximately 15 million dollars on environmental engineering controls in its Battery Division Plants. Although plaintiffs state that "in the opinion of Toxicologist Ellen Silbergeld, the technology exists to reduce blood lead levels below 15 micrograms," Ms. Silbergeld's deposition transcript reveals that she is not aware that there is technology which exists that would reduce blood lead levels at Johnson Controls to 12 micrograms. Plaintiffs have failed to demonstrate that acceptable alternative policies exist.

B. *Disparate Impact*

Although the fetal protection policy is facially neutral, it has a disproportionate impact on women; thus, a prima facie case of disparate impact exists. The employers only defense in this situation is a business necessity defense, but "[o]ne problem with business necessity as defined under traditional Title VII analysis, but applied in the context of an employer's fetal protection program, is the requirement that the employer's policy be related to job performance because fetal protection does not in a strict sense have anything to do with job performance." *Hayes*, 726 F.2d at 1552. The *Hayes* court expanded the business necessity defense to cover the fetal protection case because "the defense in a fetal protection case is justified by a genuine desire to promote the health of employee offspring. . . ." *Id.* at 1553. This Court agrees. There is a business necessity to protect fetuses. The fetus, from exposure to lead, faces a substantial risk of harm, and this exposure exists only for pregnant women. Men simply cannot expose a fetus to lead in the same way women can. The *Wright* court analogized fetuses to licensees and invitees, and stated that "[c]ertainly the safety of unborn children of workers would seem no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon an employer's premises." 697 F.2d at 1189. In view of the

fact that a significant risk exists for fetuses exposed to lead, the fetuses' safety cannot be ignored. A business would not expose its customers to lead. Furthermore, although not of primary importance, a business should be able to protect itself from future lawsuits which may arise because a child was prenatally exposed to lead. Thus, the business necessity defense applies to a lead fetal protection policy. There is a general societal interest in protecting the health of fetuses and children.

C. *Toxic Substance Control Act (TSCA)*

Plaintiffs argue that although there is a societal interest in fetal safety, the obligation of protecting society's interest *has* been delegated to the Environmental Protection Agency in the TSCA. The TSCA requires producers of chemicals to report to the EPA information about substances which pose a substantial risk. The EPA is required to take regulatory action within 180 days after receiving information that a substantial risk may exist. If the EPA determines that a substantial risk exists, the EPA can regulate the substance. One commentator has criticized the effectiveness of the Act:

> Despite its broad scope, TSCA's usefulness in dealing with fetal toxins, teratogens, and mutagens has been limited. The EPA has substantial discretion under the statute, and the agency has tended to exercise this discretion to avoid active regulation. The EPA has announced that it intends to regulate at most two or three substances per year, with relevant studies taking up to two years per substance to prepare. The Office of Management and Budget under the Reagan administration has been relentless in criticizing the EPA's modest efforts to regulate dangerous chemicals. Consequently, fetal toxins, mutagens, and teratogens have escaped regulatory review.

> When the EPA does examine a chemical, it may consider the availability of substitutes and the economic consequences of regulation before making a pre-regulation determination that the chemical poses an "unreasonable risk." Furthermore, the promulgation of regulations involves consideration not only of their economic consequences but also of the available level of technology. A consideration of both these factors would probably lead to an acceptance of hazards that may not pose significant risks to employees but do pose grave risks to their unborn children.

Timko, *supra*, p. 16, at 172. Based upon the foregoing, the Court is not persuaded that the TSCA is protecting fetuses from lead exposure. Furthermore, eliminating the use of lead in battery production has not yet been achieved. The use of lead is still necessary at this point. The company is, however, continuing to "study, develop, and implement engineering controls to reduce the lead exposure and blood lead levels of all employees." Beaudoin Affidavit, ¶ 17. Although no evidence has been presented to the Court demonstrating that the EPA has reviewed the lead situation at issue here, it is unlikely that the EPA would prevent the use of lead in the absence of a substitute. Further, because the TSCA is gender neutral, it would fail to protect the fetus which faces a significant risk from lead exposure because male and female are treated equally under the Act.

IV. *Conclusion*

Society has an interest in protecting fetal safety. Lead poses a substantial risk of harm to the fetus. This risk is born only by women who are pregnant or will become pregnant. The plaintiffs have not shown that there is an acceptable alternative that would have a lesser impact on females. Johnson Controls fetal protection policy does not violate Title VII. Stillbirths, reduced birth weight and gestational age, and retarded cognitive development

are abnormalities too serious for this Court to find unimportant.

Defendant's motion for summary judgment is hereby GRANTED.

SO ORDERED this 21st day of January, 1988, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 84-C-0472

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs,
v.

JOHNSON CONTROLS, INC.,
Defendant.

ORDER

It is hereby ordered that the opinion issued on January 21, 1988, in the above-captioned case is amended as follows: On page 2 of the slip opinion, line 30, the typographical error is corrected to read micrograms.

On page 2, lines 24-26 are amended to read as follows: Women who are in positions where their blood lead levels do not rise to 30 micrograms are prohibited from transferring into positions where their blood lead levels will rise above 30 micrograms.

Page 13, lines 12-17 are amended to read as follows: That there are "significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards the workplace make necessary, for the safety of the unborn chiidren, that fertile women workers, though not men workers, be appropriately restricted from exposure to those hazards and that its program of restriction is effective for the purpose."

SO ORDERED this 24th day of February, 1988, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case Number 84-C-472

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs,

v.

JOHNSON CONTROLS, INC.,
Defendant.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED that the fetal protection policy at issue does not violate Title VII, and defendant, Johnson Controls, Inc.'s, motion for summary judgment is granted.

Date January 21, 1988

SOFRON B. NEDILSKY
Clerk

/s/ [Illegible]
(By) Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

SEPTEMBER 28, 1989

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL A. KANE, Circuit Judge

No. 88-1308

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs-Appellants,

and

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervening Plaintiff-Appellant,

vs.

JOHNSON CONTROLS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for
the Eastern District of Wisconsin
No. 84 C 472—Robert W. Warren, Judge

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed September 26, 1989. Costs are hereby awarded to the defendant-appellee and against only the plaintiff-appellant, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-437

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS, UAW, *et al.*,
Petitioners

v.

JOHNSON CONTROLS, INC.,

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 12, 1990.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 8 day of December, 1989.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-437

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UAW, *et al.*,

Petitioners

v.

JOHNSON CONTROLS, INC.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, further extended to and including January 29, 1990.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 4th day of January, 1990.

APPENDIX G

NOTICE

1. *SUBJECT*: Policy Guidance on *United Auto Workers v. Johnson Controls, Inc.* —— F.2d ——, 51 EPD ¶ 39,359 (7th Cir. 1989).

2. *PURPOSE*: This document discusses the decision in *Johnson Controls* in light of the Commission's Policy Guidance on Reproductive and Fetal Hazards and clarifies the Commission's position on the proper legal analysis to be applied to charges challenging fetal protection policies.

3. *EFFECTIVE DATE*:

4. *EXPIRATION DATE*: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. *ORIGINATOR*: Title VII/EPA Division, Office of Legal Counsel.

6. *INSTRUCTIONS*: File behind Exhibit 624C of the EEOC Compliance Manual, Volume II, Section 624, Reproductive and Fetal Hazards. To be read in conjunction with the interim Policy Guidance on Fetal and Reproductive Hazards, dated October 7, 1988.

7. *SUBJECT MATTER*:

I. The Decision

In *United Auto Workers v. Johnson Controls*, —— F.2d ——, 51 EPD ¶ 39,359 (7th Cir. 1989), a Title VII action challenging the company's fetal protection policy, the Seventh Circuit, in an en banc decision by a vote of seven to four, affirmed the district court's grant of summary judgment in favor of Johnson Controls.

Johnson Controls maintains a fetal protection policy for its battery manufacturing division. That policy is "designed to prevent unborn children and their mothers from suffering the adverse effects of lead exposure." *Johnson Controls*, 51 EPD at 59,469. It provides that "women with childbearing capacity [1] will neither be hired for nor allowed to transfer into those jobs in which lead levels are defined as excessive." *Id.* at 59,470.

In considering the evidence on whether lead poses a health risk to the offspring of Johnson's female employees, the Seventh Circuit noted that "both the UAW and Johnson Controls agree on appeal that a *substantial* health hazard to the unborn child in the womb has been established." *Id.* at 59,472 (emphasis in original). After reviewing the record, the court concluded that "[t]he overwhelming evidence in this record establishes that an unborn child's exposure to lead creates a substantial health risk involving a danger of permanent harm." *Id.* at 59,475.

Turning to the issue of the proper Title VII defense available to Johnson Controls to justify its fetal protection policy, the court reviewed the decisions of two courts of appeal [2] and EEOC's Policy Guidance on Reproductive and Fetal Hazards (approved October 3, 1988) (hereinafter referred to as "Policy Guidance on Fetal Hazards"). Both of the other courts of appeal and the EEOC had concluded that a business necessity defense may be utilized, and the Seventh Circuit agreed with that conclusion. The Seventh Circuit described the other two courts' analyses of the defense in fetal protection cases as requiring

[1] Johnson Control's policy defines "women of childbearing capacity" as "[a]ll women except those whose inability to bear children is medically documented." *Johnson Controls*, 51 EPD at 59,470, n.8.

[2] The two decisions referred to by the court were *Wright v. Olin Corp.*, 697 F.2d 1172, 30 EPD ¶ 33,257 (4th Cir. 1982), and *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 33 EPD ¶ 34,219 (11th Cir. 1984).

(1) a demonstration of the existence of a substantial health risk to the unborn child, and (2) establishment that transmission of the hazard to the unborn child occurs only through women. In addition, the plaintiff may present evidence of less discriminatory alternatives equally capable of preventing the health hazard to the unborn. The court in *Johnson Controls* stated that it was convinced that the business necessity defense "balanced the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." *Id.* at 59,479.

Proceeding to the question of whether the business necessity defense could be utilized to sustain Johnson Control's fetal protection policy, the Seventh Circuit considered the recent Supreme Court decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 50 EPD ¶ 39,021 (1989). In that case the Supreme Court held that, once a *prima facie* case of disparate impact has been established, the employer carries the burden of producing evidence of business justification, but the burden of persuasion remains with the plaintiff. *Id.* at 2126. The Seventh Circuit applied *Wards Cove* to the case before it, placing the burden on UAW to disprove business necessity. For summary judgment purposes, the question confronting the court was whether "UAW has established a genuine issue of material fact concerning any of the elements of the business necessity defense upon which it bears the burden of persuasion." *Johnson Controls*, 51 EPD at 59,480.

On the question of whether there was a substantial risk of harm to the unborn child, the court found no genuine issue of material fact since both parties agreed on this point. As to the question of whether the risk of transmission of lead exposure to unborn children is substantially confined to fertile female employees, the court concluded that "the evidence of risk to the unborn child resulting from exposure of the father . . . is, at best,

speculative and unconvincing." *Id.* at 59,481.[3] Finally with regard to adequate but less discriminatory alternatives, the court stated that UAW had failed to persuade it that "less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates." *Id.* at 59,483.

After concluding that Johnson Controls had established the business necessity defense and would thus be shielded from liability, the Seventh Circuit stated that it was "also convinced that Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense." *Id.* at 59,484. The court recognized that the BFOQ exception to Title VII is extremely narrow, but said that the employer does not automatically lose whenever it must establish this defense. *Ibid.* Noting that Johnson Controls' business is "unique" because it requires the use of an extremely toxic substance, the court found that industrial safety is legitimately part of the "essence" of Johnson's business and that the fetal protection policy was directly related to industrial safety. In determining that Johnson's fetal protection policy was

[3] In reviewing the expert testimony on risk of harm to unborn children through male exposure to lead, the court stated that "Johnson Controls' experts, without exception, testified that a male worker's exposure to lead at [OSHA approved] levels . . . did not pose a substantial risk of genetically transmitted harm from the male to the unborn child." 51 EPD at 59,481. While UAW witnesses testified that animal studies had demonstrated a possible risk of genetic damage to human offspring as a result of male lead exposure, Johnson's experts took the position that the results of these studies were not scientifically established as being applicable to humans. The court noted that UAW had not presented any medical evidence of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure, and stated that "it is this lack of convincing scientific data that the plaintiffs attempt to gloss over and cast aside in ignoring the differences between the effect of lead on the human and animal reproductive systems." *Id.*

reasonably necessary to further industrial safety, the court stated that "'[m]ore is at stake . . . than an individual woman's decision to weigh and accept the risks of employment,'" since "[a] female's decision to work in a high lead exposure job risks the intellectual and physical development of the baby she may carry." *Id.* at 59,488, *quoting*, *Dothard v. Rawlinson*, 433 U.S. 321, 335, 14 EPD ¶ 7632 (1977).

Thus, in summary, the Seventh Circuit found that a business necessity defense should be applied to a Title VII challenge to a fetal protection policy. It also found that Johnson Controls could demonstrate such a defense and that UAW failed to prove a genuine issue of material fact with respect to the absence of such a defense. Finally, the court held that even if the BFOQ defense is applied, Johnson Controls had shown its fetal protection policy reasonably necessary to industrial safety, which was part of the essence of its business.

Four judges, Cudahy, J., Posner, J., Easterbrook, J. and Flaum, J. filed three separate dissents. Judge Cudahy concluded that the only proper defense was BFOQ, that it would be "difficult" to establish the defense but that the employer should have the opportunity to try. 51 EPD at 59,491.[4] He also determined that the "painful complexities [of the case] are manifestly unsuited for summary judgment." *Id.* at 59,492. Judge Posner, too, thought that BFOQ was the only applicable defense and that the case should not have been decided on summary judgment. *Ibid.* Like Judge Cudahy, he believed that, while the BFOQ defense is narrow, the employer might be able to establish that an exclusionary policy was "reasonably necessary to the normal operation of the business" and that it should have the opportunity to try. *Id.* at 59,493.

[4] He also stated that he "would be pleased to join almost all of Judge Easterbrook's eloquent dissent except for its [conclusion that the employer could never prevail using the BFOQ defense]." *Ibid.*

Judge Easterbrook wrote a lengthy opinion joined by Judge Flaum. Like the other dissenters, he opined that BFOQ was the only proper defense to Johnson Control's policy. Unlike the others, he thought protecting offspring could never be a BFOQ because, he said, the Pregnancy Discrimination Act "makes distinctions based on women's ability to bear children sex discrimination" and such distinctions can only be justified if the excluded women are dissimilar from others in their ability or inability to perform the functions of the job. *Id.* at 59,498. He further stated that even assuming that the *Wright-Hayes* business necessity approach is the correct one, it was inappropriate to apply *Wards Cove* and to shift the burden of proof to the plaintiff and that there were material disputes making the case unsuitable for summary judgment. *Id.* at 59,503.

II. Analysis

a. Legal Standards

In its interim guidance, the Commission did not contemplate the Seventh Circuit's application of the *Wards Cove* business necessity standard, imposing on the plaintiff the burden of disproving business necessity. The court's approach represents a significant departure from the analytical framework previously developed by the Commission in its Policy Guidance on Reproductive and Fetal Hazards, dated October 7, 1988.[5] In *Wards Cove*

[5] Under the analysis of the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), a case upon which the Seventh Circuit relied, the burden of proof would remain with the employer to demonstrate at least that there is a substantial risk of harm to the fetus that is only mediated through women. The *Hayes* court stated that fetal protection policies must be presumed to be facially discriminatory. Adverse impact analysis would apply only if the employer rebuts the presumption of facial discrimination by proving that the hazard applies exclusively to women since the policy could then be viewed as neutrally protecting all employees' offspring but adversely affecting only women. Thus,

the Supreme Court considered the business necessity defense as it arises in a traditional adverse impact case, in which a facially neutral policy impacts on a protected group. The Court clarified its view that the burden is on the plaintiff at the final stage of proof in such a case to prove that the neutral policy or practice does not serve a legitimate employment goal of the employer. 109 S. Ct. at 2125-26. Fetal protection policies, however, are not neutral rules to which adverse impact analysis applies. Instead, as stated in the Commission's Policy Guidance, policies which exclude only women constitute *per se* violations of Title VII. For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law. *See* Policy Guidance at 4 n.9, citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Indeed, in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1795, 49 EPD ¶ 38,936 (1989), a mixed motive case, the Court cited the leading fetal protection cases, *Hayes* and *Wright*, cited above at n.2, as illustrative of its longstanding assumption "that if an employer allows gender to affect its decision making process, then *it must carry the burden of justifying its ultimate decision.*" 109 S.Ct. at 1789 (emphasis added).

The Commission followed the lead of the only courts of appeals that had addressed the question in concluding that the business necessity defense applies, stating that "[t]hese cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves." Fetal Hazards Policy Guidance at 4. We did not mean to suggest that a fetal protection policy fits within the category of an adverse impact case. (*See Johnson Controls*, 51 EPD at 59,493 (Posner, J., dissenting) ("this legerdemain is as unnec-

Wards Cove would not apply unless the employer first carries its burden of proving that there is a substantial risk of harm that is substantially confined to fertile or pregnant women.

essary as it is questionable"[6]. Thus, in the Commission's view, *Wards Cove* should not apply to the analysis of the defendant's burden of proving business necessity in a fetal protection case.

The majority's application of *Wards Cove* to a facially discriminatory policy has convinced the Commission that the hybrid approach to fetal protection cases is problematic. As Judge Easterbrook said:

> [W]hen the EEOC issued its policy statement, . . . "[b]usiness necessity" and "BFOQ" were not so distinct. [After] *Wards Cove*, however, . . . the *Wright-Hayes* approach has been watered down. The court's "adoption" of *Wright*, *Hayes*, and the EEOC's policy statement is thus in practice more favorable to employers that the Fourth and Eleventh Circuits (and the EEOC) anticipated their approach would be. The plaintiff won in *Hayes*; she would lose under [the] majority's approach.

51 EPD at 59,493 (emphasis in original). In the interim Fetal Hazard Policy Guidance at 4 n.10, the Commission said that a BFOQ analysis is arguably applicable. Given the Seventh Circuit's uncritical application of the *Wards Cove* adverse impact burdens to a factually distinct claim of facial discrimination, we now think BFOQ is the better approach. As the *Johnson Controls* dissenters point out, it is more consistent with Title VII's structure and purpose to allow a defendant in a case challenging a facially discriminatory fetal protection policy only the statutory defense of proving that sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). 51 EPD at 59,492 (Cudahy, J.); *id.* at 59,492-93 (Posner, J.); and *id* at 59,499-500 (Easterbrook, J., and Flaum, J.).

The question, then, is whether and to what extent an employer can establish a BFOQ defense in these cases.

This will ultimately be matter of judicial interpretation of the language of the BFOQ provision. The *Wright* and *Hayes* courts "concluded that [fetal protection] policies can never satisfy the stringent requirements of the occupational qualification defense." 51 EPD at 59,493. Judges Easterbrook and Flaum took a similar view. *Id.* at 59,500. For purposes of its investigations, and as a matter of public policy, the Commission is unwilling to say that no possible defense is available to an employer that has a fetal protection policy.[6] Rather, the Commission's position is best reflected by Judge Cudahy's observation that "[i]t may (and should) be difficult to establish a BFOQ [in fetal hazard cases] but I would afford the defendant an opportunity to try". *Id.* at 59,491.[7]

In applying the BFOQ defense to these cases, we caution that the defense is written and should be read narrowly. *See* 51 EPD at 59,493 (Posner, J., dissenting). It imposes a threshold requirement that the employer must state a reasonably necessary business objective for its fetal protection policy. While Judge Easterbrook does not think fetal protection has anything to do with Johnson Controls' ability to make batteries, *id.* at 59,493, Judge Posner concludes that the "normal operation" of a business can incorporate the employer's legitimate concerns

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[6] Every court to have addressed the question has allowed the employer the opportunity to justify its policy. The Commission's investigatory policy must reflect this reality. To apply the Easterbrook approach to Commission charge processing would be to prepare cases inadequately for litigation.

[7] There is, however, considerable merit to Judge Easterbrook's observation that allowing an employer the opportunity to justify a sex discriminatory fetal protection policy embroils the Commission and courts in scientific conflicts that they are ill equipped to properly resolve. 51 EPD at 59,501-02. Title VII and the institutions which enforce it were designed to eliminate employment discrimination, not to evaluate evidence concerning workplace safety. Such evaluations are better left to agencies with appropriate expertise such as OSHA or the EPA.

for the safety of others.[8] As he says, "It is possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal." 51 EPD at 59,493. Therefore, the Commission concurs with Judge Cudahy's observation that the employer "may permissibly consider the possible risks to (even potential) third parties in the normal course of business decision making." 51 EPD at 59,492 n.1.

The employer must show that protection of third parties from risk is "reasonably necessary to the normal operation of the particular business."[9] One cannot merely assume, for purposes of analysis of a Title VII discrimination claim, that containment of any hazard, however improbable or inconsequential, is "reasonably necessary"

[8] *Accord* 51 EPD at 59,491 n.1 (Cudahy, J., dissenting) ("On this issue, I disagree with Judge Easterbrook's conclusion that the BFOQ standard could *never* be satisfied in a case such as this. . . . So long as it is understood that the burden to prove [that all or substantially women cannot perform the job without inordinate risk to third parties, including fetuses] rests on the employer, and that this burden may not be met by unsubstantiated hypotheses or claims of scientific uncertainty, (citation omitted), I am comfortable with allowing the employer at least the opportunity to attempt to meet this demanding standard.")

[9] In *Western Air Lines v. Criswell*, 472 U.S. 400, 37 EPD ¶ 35,291 (1985), involving a challenge to an airline's policy of requiring mandatory retirement for flight engineers at age 60, the Supreme Court described the BFOQ defense in the public safety context. First, the employer must prove that:

> the job qualifications [he] invokes to justify his discrimination [are] reasonably necessary to the essence of his business. . . . The greater the likelihood of harm and the probable severity of that harm . . ., the more stringent may be the job qualifications designed to insure safe[ty].

Id. at 413, citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236, 11 EPD ¶ 10,916 (5th Cir. 1976).

to that business's "normal operation"—this must be proven.[10] To prove that such a practice is reasonably necessary the employer must demonstrate that it takes reasonable steps to identify and appropriately shield all persons from the hazard against which it purports to protect the excluded group. Most obviously, where an employer has excluded pregnant or potentially pregnant women on the basis of a perceived risk to the fetus, it must show that it similarly protects the offspring of its male employees from the same or analogous risks. In addition, it must show that it attempts to protect others from the same hazard. Containment of a particular hazard, such as lead, can hardly be reasonably necessary to its normal operations if the employer carelessly exposes everybody to that hazard except potential offspring of female employees.

If the employer establishes that protecting others from the particular hazard is part of its normal business operations, it must then establish that its exclusionary policy is reasonably necessary to further that interest. As the Supreme Court said in *Western Air Lines, Inc. v. Criswell*, 471 U.S. 400, 414, 37 EPD ¶ 35,291 (1985), the discriminatory qualifications must:

> be something more than 'convenient' or 'reasonable'; they must be reasonably necessary . . . to the par-

[10] In age public safety cases, for example, to justify its exclusion of older workers on safety grounds, the employer must demonstrate that to protect the public from real risks, it applies the same standards across the board. Where, for example, a police department defends its exclusion of older officers on the basis of lower aerobic capacity or alleged higher risk of cardiac disease, the Commission has consistently argued that, to make out a BFOQ defense, the department must impose similar fitness requirements on all of its officers. It cannot establish that protecting the public against the risks occasioned by an officer suffering a cardiac incident is reasonably necessary to the normal operations of its particular business if it retains younger officers who, by virtue of factors such as smoking or obesity, pose a similar risk.

> ticular business,' and this is only so when the employer is compelled to rely on [the discriminatory classification] as a proxy for the safety related job qualifications validated in the first inquiry.

In a BFOQ defense of a fetal protection policy excluding women workers, the employer must prove that there is a substantial risk of harm to offspring through occupational exposure of potential parents to the hazard identified. Next, if it applies its protective policy only to women, it must prove that the risk is transmitted only through pregnant women and that it has a factual basis for believing that all or substantially all of the excluded group cannot perform the job without jeopardizing the safety of the group's offspring. (*See Johnson Controls*, 51 EPD at 59,492 n.1 (Cudahy, J., dissenting), citing *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)). In other words, the employer must prove that the policy it has adopted to reduce risk is narrowly tailored: if it excludes all fertile women when the risk is only through pregnant women and there are reasonable steps which can be taken to reduce or eliminate, as necessary, the exposure of pregnant women, the exclusionary policy cannot be said to be "reasonably necessary".[11] Similarly, if there are reasonable ways to test for safe levels of the hazard, as is true in the case of radiation and lead exposure, the employer that does not use such tests to minimize the extent of the exclusion will not meet its BFOQ obligations.

In short, whether one applies the BFOQ or the "business necessity" analysis as discussed in the fetal hazard policy guidance, the burden is on the employer to justify

[11] The majority does not appear to have required Johnson Controls to make this showing. It acknowledged the propriety of the *Weeks* standard but perfunctorily concluded that the policy was a BFOQ without discussing whether Johnson Controls has proved that it had defined the excluded group as narrowly as possible despite the fact that the policy excluded all women age 70 and under.

its policy. The pertinent questions are: 1) whether there exists a substantial risk of harm to offspring through workplace exposure to a hazard; 2) whether that risk takes place only through the exposure of one sex; 3) whether the policy minimizes the risk while excluding the narrowest possible group; and 4) whether there are reasonable alternatives which are less onerous to women. *See* Fetal Hazard Policy Guidance, nn. 14-17 and accompanying text.

b. Propriety of Summary Judgment

The Seventh Circuit found no genuine issue of material fact to warrant denial of summary judgment to Johnson Controls. In the Commission's view, as stated in the interim Fetal Hazard Policy Guidance at n.22, this case did present conflicting evidence. As Judge Cudahy stated in his dissent, this case presented "painful complexities [which] are manifestly unsuited for summary judgment." 51 EPD at 59,492.

Commission investigators should not overlook or dismiss conflicting evidence on the basis of the Seventh Circuit decision. Although the majority was satisfied that substantial risk to the fetus was established, Judge Easterbrook stated that there was a dispute as to the extent to which the level of lead to which Johnson exposes its employees would endanger a fetus. *Id.* at 59,503. He also observed that the risk of harm to a fetus should also include the risk of inferior prenatal care resulting from removing women or denying them access to well-paying jobs with attendant health insurance. *Id.* at 59,505.

There was substantial conflicting evidence as to whether the risk of lead exposure to a fetus is mediated only through women. 51 EPD at 59,492 (Cudahy, J., dissenting). *See* EEOC's Policy Guidance on Reproductive and Fetal Hazards at 9 n.22 (district court's issuance of summary judgment in *Johnson Controls* was not appropriate because there was conflicting evidence about harm medi-

ated through men). Judge Easterbrook, in his dissent, stated that the American Public Health Association and other medical groups, filed an *amicus* brief "marshaling an impressive array of studies linking lead with injury to the male reproductive system, and thence to offspring." *Id.* at 59,506. While most of the data came from animal studies, some human studies, according to Judge Easterbrook, also suggest the same result.

The majority in *Johnson Controls* rejected UAW's animal research evidence, stating that it was "speculative," "unconvincing" and not "solid scientific data." *Id.* at 59,481. *See* n.3, above. Commission investigators should not reject animal studies in such a wholesale manner. *See* 51 EPD at 59,506 (Easterbrook, J., dissenting) ("The medical profession . . . will be stunned to discover that animal studies are too "speculative", slip op. 33, to be the basis of conclusions about risks"). These studies may in some cases provide the best available evidence to evaluate fetal or other human health hazards in the workplace. Certainly, the data from the animal research in this case, along with the other data provided, should have been sufficient to create a genuine issue of material fact warranting denial of summary judgment. Also significant to the issue of harm mediated through both sexes, is OSHA's finding that lead in men, as well as women, is hazardous to the unborn and its conclusion that exclusion of only women is not the proper solution. The majority failed even to acknowledge this aspect of OSHA's findings. *See id.* at 59,505, citing 43 Fed. Reg. 52953, 52966 (1978) and 29 C.F.R. Part 1910, pp. 833-34 (1987). Commission investigators, in contrast, should defer to pertinent conclusions by appropriate government agencies. *See* n. 16 and accompanying text.

There was also conflicting evidence as to the feasibility of more narrowly drawn alternative measures. *See* Judge Posner's dissent at 51 EPD at 59,496, noting that, even assuming harm, there were questions about the "feasibility of warnings as a substitute for a blanket exclusion of women",[12] and "what other battery manufacturers do about the hazards of airborne lead to the fetus." Judge Eatserbrook observed that women could be allowed to work in areas in which many employees are able to keep their blood levels within the safe range to see if they can do the same. 51 EPD at 59,507.

III. Charge Processing

Commission field offices should not rely on the *Johnson Controls* decision as guidance for processing "fetal hazards" charges.[13] Employment policies that exclude women on the basis of pregnancy or capacity to become pregnant are discriminatory on their face and employer justifications for such policies must be examined critically. The majority in *Johnson Controls* gave undue deference to the employer's judgment in broadly drawing its exclusionary policy. The court stated that this deference was required due to the "unique" nature of Johnson's business and the "difficult societal problem" that the policy was designed to address." 51 EPD at 59,487. As further support, the court twice quoted the Supreme Court's statement in *Wards Cove*, that "[c]ourts are generally less competent than employers to restructure business practices . . . [and] consequently, the judiciary should proceed with care before mandating that an employer must

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[12] Before adopting its blanket exclusion of women "of childbearing capacity," Johnson Controls issued a mild warning comparing the fetal hazards of airborne lead to those of cigarette smoking. 51 EPD at 59,496. During that period, eight women in the battery division became pregnant, but the record did not reveal the total number of women employed. Thus, it is possible that even the mild warning was effective for the vast majority of female employees, and that a stronger warning would have deterred other fertile women from working in the division.

[13] Of course, it is currently binding precedent in the Seventh Circuit and offices in that Circuit must evaluate charges in light of it.

adopt [an alternative employment practice] in response to a Title VII suit." *Id.* at 59,487 and 59,491, quoting *Wards Cove*, 109 S.Ct. at 2127. However, the Supreme Court's statement was made in the context of an adverse impact challenge to neutral job selection practices. Such deference is not required when the practice that is challenged is facially discriminatory.

The directions for investigation and evaluation of evidence set forth by the Commission in its interim Policy Guidance on Reproductive and Fetal Hazards, as elaborated on by this document, should continue to be followed in processing charges challenging fetal protection policies.[14] *See also* Section 624 of the Compliance Manual. While the Commission now believes, for the reasons explained above at 6, that a BFOQ rather than business necessity is the appropriate defense, the elements of inquiry set forth in the policy guidance remain applicable to Commission investigation of fetal hazard policies. As stated above, fetal protetcion policies that exclude only one sex from particular jobs are facially discriminatory and cannot easily be justified. The first inquiry is whether protection from the hazard at issue is part of

[14] Two aspects of the interim Policy Guidance need to be clarified. First, it stated that where there was reliable evidence of risk to women, but inconclusive evidence of risk to me, the Commission would proceed as if the risk were confined to women. In so saying, the Commission was referring to situations in which the evidence of risk to men was speculative and meager. It intended that where there is reliable—albeit inconclusive—evidence of harm mediated through men the Commission will conclude that excluding only women is not justified and will issue a cause LOD. Second, the chart at the end of the policy guidance is confusing, in part because it was developed under the rubric of business necessity, and should no longer be relied upon.

Finally, while the Policy Guidance reflects the fact that most fetal hazard policies exclude women, it is possible that an employer might exclude only men. The interim Policy Guidance, as clarified here, would apply equally to such cases, with the genders simply being reversed.

the normal operation of the business. Second, there must be objective evidence of substantial risk to offspring through workplace exposure of the excluded group. Mere suspicion or fear of risk is not sufficient. The scientific evidence must also show that the harm is mediated only through the excluded group. Finally, the policy will not withstand scrutiny if a less discriminatory alternative policy is reasonably available that would effectively protect employees' offspring.

In evaluating these cases, the field must weigh the extent of the risk against the breadth of the exclusion. Thus, where the risk is slight, in terms of numbers and nature of the harm, any exclusion will be hard to justify; conversely, severe harm to a high percentage of those exposed may warrant a broader exclusion.[15] *See* 51 EPD at 59,504 (Easterbrook, J., dissenting) ("a small risk, even if compellingly documented, is not enough to exclude women from employment"). For further guidance on evidence to be obtained, *see* Policy Guidance on Fetal Hazards at 6-7.

In determining whether the harm is mediated only through one sex, animal research should be considered along with any other objective scientific evidence. The Commission will defer to pertinent findings by government agencies such as OSHA or NIOSH.[16] *See* Policy Guidance on Fetal and Reproductive Hazards at 8.

[15] As the Supreme Court noted in *Criswell*, the first prong of the BFOQ test "adjusts to the safety factor." 472 U.S. at 413. *See supra* n.6.

[16] Of course, the Commission would consider evidence of scientific developments subsequent to the issuance of government regulations which might, for example, show substantial risk at a lower level of exposure than was thought harmful when the regulations were written. However, where an agency such as OSHA has found evidence of harm mediated through men and has explicitly rejected the approach of excluding only women, the Commission will generally defer to that decision in determining whether an exclusionary policy is justified.

Even if the risk of harm were mediated only through one sex, the Commission thinks that an exclusion as broad as the one in *Johnson Controls* could seldom be justified. Again, these are discriminatory policies and must be drawn as narrowly as possible consistent with achieving legitimate safety goals. Johnson Controls excluded all presumptively fertile women even from non-hazardous jobs from which they might be promoted into high-lead jobs.[17] 51 EPD at 59,497. This aspect of the "fetal protection" policy is not necessary to protect the offspring; rather it is a matter of convenience. As such it could not constitute a defense (*See Criswell* quoted *supra* at 8) and the Commission would find cause as to the portion of the policy even if it concluded that some exclusion may be warranted. Finally, where safe blood levels can be ascertained there can be little reason to exclude women whose blood levels are within the safe range.

While it is the Commission's position that the employer carries the burden of proof in litigation of justifying the challenged policy, the investigator should seek out all reasonably available evidence relating to the workplace hazard, the risk of fetal or reproductive harm, the steps the employer takes to protect others from the hazard, the harm mediated through the non-excluded sex and any less discriminatory alternative policies.

Date: 1/24/90

Approved: /s/ R. Gaull Silberman
R. GAULL SILBERMAN
Vice Chairman

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[17] The employer's policy also was excessively cautious in presuming that any woman under the age of 70 is fertile. 51 EPD at 59,497. However, Judge Posner noted that this aspect of the policy was harmless since a woman too old to bear children need only submit a letter to that effect from her doctor to be permitted to work in the battery plant.

APPENDIX H

STATUTORY PROVISIONS INVOLVED

Title VII of the 1964 Civil Rights Act, § 701(k), 42 U.S.C. § 2000e(k), provides:

> (k) The terms "because of sex" on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

Title VII of the 1964 Civil Rights Act, § 701(a), 42 U.S.C. § 2000e-2(a), provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII of the 1964 Civil Rights Act, § 703(e), 42 U.S.C. § 2000e-2(e)(1), provides in part:

> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .